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THE

Laws Relating to Pews

IN

CHURCHES,

DISTRICT CHURCHES, CHAPELS,

AND

PROPRIETARY CHAPELS,

THE RIGHTS INCIDENTAL THERETO,

AND

The Remedy for Wrongs.

BY

SIDNEY BILLING, Esq.,

OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

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BENCHER OF THE HONOURABLE SOCIETY

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PREFACE.

THE Law relating to Pews has been rendered more than usually important, by the late discussions upon them, and the spirit with which such discussions have been conducted; for the inquiry has not been directed to the right which exists, but how that right might be swept away. When a right has been so menaced, it was thought that the law, particularly relating to the subject threatened, should be presented in the clearest manner.

The pew right, (as a general right,) has existed from the time of the Reformation, and no work, which can be strictly termed a law book, has been specially dedicated to an inquiry into the law of this subject, and its incidents. Writers upon Ecclesiastical Law have collected some of the broad features relating to them, and books upon general subjects have afforded the matter a short space, but it was only in the Reports that the law was to be found.

This Book was written to supply what the Author, (and, doubtless, others in the Profession also,) felt was a defect, and it is trusted that it will at least lighten the labour of research, if its use extends no further.

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The cases which govern the law on this subject, will be found to be somewhat conflicting, but care has been taken in advocating that view which the Author deemed to be in consonance with the principles of law, that the authorities which bear upon the view opposite to that taken, may appear, and where a judgment or a dictum has been canvassed, in the course of these pages, it is hoped the examination will be placed to the wish for inquiry into the truth, rather than to a spirit of captious objection, for it is only by such inquiries that the subtleties of the law can be manifested, and justice be administered.

The Treatise has been divided into Headings, rather than into Chapters, for it was considered that such a division would render the Work more concise, and avoid, in a degree, the great evil which appears in law writings generally, which is the almost unavoidable repetition of the subject.

The consideration for a faculty, and the right which a non-parishioner can acquire, and the rights which are inherent in parishioners generally, have been commented upon at a greater length than was at first intended; but the trust is, that the reasons above advanced will prove a sufficient apology for presenting this Work to the Profession, *viz.*, making those who possess the threatened right aware of the position in which they are placed, and the protection which the law will afford them.

Middle Temple.

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AUTHORITIES AND ABBREVIATIONS.

Black. Com. "Blackstone's Commentaries."
Brac. "Bracton."
Burn's Ecc. Law. "Burn's Ecclesiastical Law."
Bull. N. P. "Buller's Nisi Prius."
Inst. "Coke's Institutes."
Com. Dig. "Comyn's Digest."
Degge P. C. "Degge's Parson's Counsellor."
Doc. Pla. "Doctrina Placitandi."
F. N. B. "Fitzherbert's Natura Brevium."
Gib. Cod. "Gibson's Codex."
Gibbons on Limitations.
Johns. "Johnson's Ecclesiastical Law."
Ken. Parl. Ant. "Kennett's Parliamentary Antiquities."
Phil. "Phillipps on Evidence."
Rogers Eccl. Law. "Rogers's Ecclesiastical Law."
Roll. Abr. "Rolle's Abridgment."
Ros. Dig. Evid. "Roscoe's Digest of Evidence, by Smirke."
Selden. "Selden's Antiquities."
Stephen's Com. "Stephen's Commentaries."
Tidd Prac. "Tidd's Practice."
Wat. Clerg. Law. "Watson's Clergyman's Law."
Wood's Ins. "Wood's Institutes."

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ERRATA.

Page 7 line 4, *for* "none goes so," *read* "none go so."
12 —— 3, *for* "Parnham," *read* "Parnam," and so through the work.
13 —— 24, *for* "the many," *read* "many."
15 —— 26, *for* "family increases," *read* "family decreases."
17 —— 6, *for* "*Rep.* 188," *read* "*Rep.* 138, *S. P.*"
20 —— 8, *for* "time of mind," *read* "time out of mind."
24 —— 19, *for* "2 T. R.," *read* "3 T. R."
32 —— 9, *for* "Bull.," *read* "Butt."
36 —— 21, *for* "purely spiritual," *read* "purely of spiritual."
41 —— 15, *for* "acquired by faculty," *read* "acquired by a faculty."
42 —— 13, *for* "the other servants," *read* "the servants."
44 —— 3, *for* "he continue," *read* "he continues."
57 —— 23, *for* "conduc the," *read* "conduct he."
60 —— 8, *for* "new pewing," *read* "for newly pewing."
60 —— 9, *for* "Church," *read* "the Church."
63 —— 25, *for* "Ongar," *read* "Orgars."
67 —— 7, *for* "exclusive right," *read* "an exclusive right."
71 —— 30, *for* "to the wants of the parish," *read* "to supply the wants of," &c.
79 —— 1, *for* "Griffiths," *read* "Griffith."
81, last line, *for* "Curteis," *read* "Curtis."
98, second marginal reference, *for* "new," *read* "necessary."
109, line 2, *for* "would be in," *read* "would vest in."
121 —— 1, *for* "Tamworth," *read* "Farnworth."
127 —— 1, *for* "whereby acceptance," *read* "whereby the acceptance."
135 —— 18, "colour," *dele* "u."
145 —— 20, *for* "would reserve," *read* "would have reserved."
145 —— 21, *for* "which we find," *read* "but which," &c.
148 —— 7, *for* "sec. 25," *read* "sec. 32."
160 —— 18, *for* "district parishes," *read* "distinct parishes."
173 —— 23, *for* "damage," *read* "as damaged."
178 —— 28, *for* "Gibson," *read* "Gilson."
184 —— 1, *for* "Hollocks," *read* "Hallocks."
188 —— 16, *for* "Carlton," *read* "Carleton."
188 —— 24, *for* "Gardener," *read* "Gardner."
189 —— 7, *for* "Preagrove," *read* "Preagrave."

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INTRODUCTION.

The object of this Treatise is to place the Law of Pews before the public in a clear manner, and therefore is it that all technicalities, as far as it was possible, have been avoided. The subject-matter of such a Treatise has been, in these times, rendered particularly necessary and interesting, not so much from the importance of the pew right itself as for the attack which has been made upon it.

The right to particular pews will be found, by a perusal of the following pages, to have been carried back to a very remote period of the English Church History: and immediately after the period of the Reformation the right will be found to have become very general; for it is supposed that it was about that period Churches were first pewed. It will be sufficient for our purpose in this place to state, that the right to sit in the parish Church for the purpose of attending the public administration of the duties of religion, is inherent in every parishioner, and when pews are appropriated by

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faculties or claimed by prescription, it may be said to be only a special mode of enjoying the common law right.

The tractarian spirit which has been manifested in these times, has not been contented by attacking the observances of the Church, and the endeavour to subvert the simplicity of the forms which hitherto have been observed in the performance of the ritual of the English Protestant Church, from the time of the Reformation, by the introduction of ceremonies:—which, if allowed to progress, might end in the substitution of form for feeling; and a pompous, and gilded show, for that simplicity, which by the total absence of all exterior aids, must prove that the worship of Almighty God is the ostensible object of the attendance upon the offices of religion.

The disposition, or, rather, the peculiar mode of seating the parishioners in the Church, has been deemed a matter not too mean to engage the subtle-minded logicians of the high Church, and the advocates of those peculiar tenets, in which the doctrine of the low Church is comprised. For this particular object the antagonist parties meet, as it were, upon common ground, and from a spirit of innovation, springing on the one hand from a wish to assimilate, as far as may be,

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English Churches to those of Rome: and, on the other, from a mistaken notion of charity, which is both wrongly based, and ill deduced.

The Christian theory is a high, and exalted doctrine, yet, when its peculiarities are applied to frail, and erring men, their antipathies, and conventions must be taken into the account; for, in dealing with men, and such as come within the definition of Christians; it is not to be assumed that the pure, and holy doctrine has so spiritually endued their minds, that that which is of earth is wholly to be shut out; the world, the distinction of classes, and the observances of actual life, must, in some degree, intrude, and, as the influence is more, or less, so will either scale predominate. How, then, shall it be said there shall be no particular pew right in the Church: yet, such is said both by the high, and the low Churchmen—are men no more to be subjected to the usual impulses?—Or are all the distinctions which society has created to be confounded?

It has been inferentially advanced as an argument for the abolition of pews by Mr. Fowler, in his book upon "Pews," that as there are no pews in the Catholic Churches, there should be none in our Churches. It in return might be asked, were the spaces in the spacious continental Cathedrals

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not pewed from a wish that all might be equal?—Or was it—That the grand, and the magnificent machinery of the Romish Church might be seen to its greatest advantage?

When the high Church party step forward to advocate the cause of the abolition of pews in Churches, it is, as has been before said, from a wish to introduce a similarity in appearance to the continental Churches. An intimate knowledge of the impulses of men will show, that when the outward appearances are destroyed, that which is more particular and important too often follows; it was a far-sighted view which directed the attack upon things seemingly unimportant; for men are governed by association, and appearances are its outworks. The Romish religion has ever been full of ceremonies, and observances; and, even in the Romish Chapels of Protestant England there is more than sufficient grandeur to confound the ignorant; who gaze upon its external splendour, and pomp: whereby the imagination is charmed, and the heart seduced; yet without being touched.

The introduction of the ceremonies of the Church of Rome into the forms of that of England would, it is conceived, end in the subversion of the latter; for, however slowly, and carefully the alteration might be introduced: it would end in the

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adoption of all the external aids which are practised by that most subtle of all Churches; and which has ever sought rather to act upon the weaknesses of man, through the imagination, than to convince the reason.

To thinking, and reasoning men, however much they might regret the change, it would make no difference: but all men do not reflect, and with such as do not, the ceremony would be confounded with the spirituality, until the distinction between the creeds would be to the million lost; and the glare of the outer ceremony would conceal the rottenness within: the absurdities of transubstantiation would be received instead of the most reasonable theory which the Protestant Church inculcates; and in maintenance of which, great, and good men have bled: and England would again fall under the yoke of Rome, if not to endure the terrors of martyrdom, yet most certainly exaction, extortion, and the thousand miseries incidental thereto.

If then, the introduction of the Romish ritual, under a false garb, is the aim, as it is said to be, of the tractarians; should they not at least be open to suspicion, when they attempt to introduce, or rather, advocate the introduction of their forms, and ceremonies: under the pretence of advancing the

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cause of the poor man? cloaking all as they do beneath the garb of universal charity.

It has been considered necessary to diverge so far from the direct course of the subject in discussion, that the motive which actuates the tractarian, or PUSEYITE may be shown: that men, by the beautiful theory they have reared, or, rather, adopted, may not be led away from the question of the positive right. But let the theory spring from what source it will, and be the arguments which are adduced to support it whatever they may, it is impossible in practice; so long, however, as men are actuated by the realities of life.

To account for the like advocacy by the low Church party may be a matter of much greater difficulty, though, perhaps, in both cases, it may resolve itself into greediness for proselytism. But of such actuates or motives enough—the pen was assumed, not for the purpose of arguing a question of POLEMICS, but in defence of an universal right; it is called an universal right, because every parishioner has a right to a seat in the Church, and if one be wrongfully appropriated, however poor the applicant might be, he could compel the churchwarden to allot him a seat. Therefore: it is said to be an universal right.

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Pew rights have been attacked by a gentleman who should be a defender rather than a subverter of rights: unless he could produce the most positive, and conclusive argument to show that they are a crying, and most flagrant injustice; and in doing so, it is apprehended something more than a stale proposition should be adduced; and which, however true it may be in theory, it is impossible, under the existing state of things, to reduce into practice.

If society could be re-organized—if men could forget the distinctions of life—if the rights of property could be reduced to their origin, then, by possibility for a short time at least, the theory might work: but for its continuance things must be kept exactly in the same state; for the smallest progression made by one of the community would raise him above his fellows, and immediately create a distinction: and which, if once established, would, in despite of all, overturn the theoretical equality, and men would naturally fall into classes. In such re-organization, or reduction to its primitive elements, the minds of all must follow in the march, and be circumscribed within exactly the same limits; for whilst men are unequal in capacity there must be gradations in society; and whilst distinctions in society exist, it is apprehended that the abolition of the pew rights, and making the Church

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in common, or, rather, reviving in respect of them the exploded theory of common occupancy, is as chimerical as the propositions, or pictures contained in the Utopia.

The doctrine of common occupancy was abolished for its practical inconvenience: and, it is apprehended the difficulties which attached to it when exerted upon secular things, would be greatly increased when applied to pew rights: for the interruption of the sacred ordinances of religion must, at the least, be the result.

In the work above mentioned there are a series of propositions put forth, and which are endeavoured to be used as arguments to show the injustice of the continuation of the pew right; such as the inelegance of pews, the harbouring of dirt, and damp, &c., and then follow examples of several Churches, wherein it is said, the proposed abolition of pews has been tried.

It is intended, in the course of these few introductory remarks, to examine each of these propositions, and to test the examples which have been adduced in favour of the well working of the system; and it is apprehended, that it will be shown that the evil which is complained of will, by the new arrangement, be rather increased than diminished.

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It is said (*Fowler on Pews*, p. 60,) "it is well known that population has so prodigiously outrun the capacity of Churches to contain it," "that the Church-building spirit lately awakened has barely kept pace with the growth of the population," and that "the real deficiencies of the Church are as alarming as they were thirty years ago." The "Temple Church" is instanced as an example of the propriety of abolishing pews, so also "Chesterfield Church," "St. Mary's, at Beverley, St. Mary's, at Stafford, St. Sepulchres, at Cambridge," but Chesterfield Church seems to be that which is specially relied upon to show the good working of the system proposed. "The case of the Church of Chesterfield, therefore, goes further as an illustration than I expected it would, and realizes, at least with respect to a considerable part of the Church, that equality and impartiality in its arrangements which has been endeavoured to be pointed out as the true principles of Church accommodation," (*Ib.* 91); but prior to which he tells how the change was brought about. "Chesterfield Church consists of a nave, transept, and chancel, and until a recent period the floor of the nave, which was divided from the rest of the Church, and the galleries which surrounded the nave on every side, were entirely occupied by close pews; most of these

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pews were regarded, and claimed by different inhabitants as private property, and, in some instances, individuals were considered to be the owners and proprietors of a considerable number of pews, and were in the habit of letting them at certain rents, like houses, conveying them by sale, devising them by will, and, in all respects, treating them like other property," (*Ib.* 85); and of all these claims, when investigated on the obtainment of the faculty, it was found "that the only pews held by either of the recognized titles (prescription and faculty) were the corporation seats," (*Ib.* 86).

To prevent the exceeding opposition which the proposed measure had excited, "it was ultimately compromised by an agreement that the claims of all parties who had been in the habit of letting pews should be disregarded, but that the churchwardens should provide sittings for such householders as had previously been permanent occupiers of pews, and should not disturb them so long as they remained parishioners and frequented the Church as their ordinary place of worship," (*Ib.* 86).

It is said the alteration has been attended with great benefit. "With regard to the galleries closed pews are still allowed to remain in that quarter," (*Ib.* 87); and in continuation, it is said, "with regard to that part of the Church which is furnished

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with open seats hitherto left free and unappropriated, it is found among the regular frequenters of the Church that they have little difficulty in seating themselves on successive Sundays in the same free sittings, and so great is their security that many persons have furnished the free seats with *cushions and hassocks*," "but it *is rarely found* that any regular attendant is disturbed in *his usual sitting*, nor has this alteration caused any indecorous confusion amongst the poorer claimants for accommodation," and then, after the statement of the facts, follows the argument, as it is there contended, which bears out the position proposed. He says, "that by the alterations lately effected the very same edifice which formerly contained about 1200 sittings, now affords accommodation to more than 1800 persons, and this surprising increase was simply effected by contesting all doubtful claims to the exclusive appropriation of the pews," "and by substituting uniform open benches for the closed and variously-shaped pews." "In this case it may be truly said, that the great mass of the poorer inhabitants were literally *excluded* from the services of the Church, for there were only *sixty-four sittings* for adults left *unappropriated* in the whole building; to call this, therefore, the poor man's Church was to pay the Church of Chesterfield a

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very ille compliment indeed. Again, this example proves that where the poor can obtain accommodation as a matter of right, and of the same description as that which is offered to the rich, they are disposed to attend the services of the Church, and by the adoption of these plans are greatly encouraged to do so. (*Ib.* 89)."

The above selections, it has been considered proper to make for the purpose of testing the argument which has been adduced in support of the system proposed; and also, as the Church in question is, it is said, one wherein the system proposed has been tried, and found to be *completely* successful. The example produced (Chesterfield Church) will, it is presumed, be admitted to be a most unfortunate selection, especially as it is put forth as an *illustration* of the triumph of *particular views:* for it, in itself appears to be most incomplete, and as far as it goes, most inconclusive.

The Temple Church stands first upon the list, and it therefore, if for no other consideration, is entitled to the first comment. It has a congregation which is unlike any other congregation in England, the Chapels of the Colleges of the Universities coming nearest to it. In the Temple Church the most exclusive rules are adopted, and carried out, and at certain part of the year it

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is impossible for strangers, except through the express written order of a Bencher of one of the two societies comprising the Temple, to obtain admission into the body of the Church during the Sunday services. It is true, particular parts of the Church are appropriated to the particular ranks of the members; and in those places so apportioned the seats are in common; and as the Church is exclusively appropriated to the members of the two societies: it may be said to be a congregation of gentlemen; and any objectionble conduct from one towards another could not be expected, and in their particular case, the argument to be used against the general system of benches would not apply, all there being equal (in the sense in which the word is here used). And though the seats are said to be in common, it is only in a degree, for between the sittings of the two societies, *viz.*, the Middle and Inner Temple: there is a division which extends throughout the body of the Church, and it is very doubtful whether a member of one society would be allowed to occupy a sitting which is allotted to the other society; but be that as it may, it is very certain he could not claim it as of right. It is presumed that the instance produced in the Temple Church will count for nothing in furtherance of the theory in question.

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Chesterfield Church is the next in order upon the list, and on it Mr. Fowler seems to have relied for complete proof of his theory, for he says it goes further *as an illustration than he expected.* The facts he has adduced, and the arguments offered in support of such an assumption, will be commented on in the order in which they are placed above, (*supra*, p. xvii). Of the other examples he says nothing: and therefore it is a fair inference that from them nothing could be brought to bear upon the subject-matter of his theory: or in furtherance of his particular views: or it might be fairly said they are rather proofs of the ill working of the system, or surely one, or other of them could have furnished some point of evidence.

The case of Chesterfield Church is the one especially open to discussion, for facts are afforded as a basis whereon to found an argument. It is said (*supra*, p. xix) that the Church was formerly pewed in the usual manner; and as the Church accommodation was found to be insufficient, it was proposed to alter the interior arrangement, and to substitute open benches; but with this plan it was found certain claims interfered, many of which it appears were of an *illegal* origin, as being the subject of barter and sale. To stifle the opposition which it was feared the proposed measure

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would excite, it was agreed that the illegal holdings of those who claimed the power of sale should be disregarded, and they who had the right of the permanent occupancy of the pew should be appointed during residence, and user to particular sittings (*supra*, p. xviii) and such exclusive appropriations amounted in number to "*eight hundred and ninety-two* sittings." He then further says, that in the new arrangement the galleries remained as they were before, (*supra*, p. xviii); and that the poorer inhabitants were excluded from the Church, there being room for only sixty-four adults in the free sittings.

It is difficult to understand why the seats in the gallery should not have been subjected to like treatment, as those in the nave of the Church, for the pews therein are held exactly upon the same basis as those in the nave: and if the illegal system was carried on in the nave of the Church, it is more than likely to exist in the undisturbed pews in the gallery. If the pews in the gallery are allowed to be continued under the old usage, it is creating in a more acute form the very evil which is so much complained of; and it is doubtful, unless upon the direct interference of the ordinary, whether the occupant of the gallery pews could be disturbed; for if a parishioner claimed to be seated, the churchwarden,

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rather than involve himself in litigation, would reply that the seats in the nave of the Church were unappropriated and in common. It is advanced as a reason, in furtherance of the theory in question, that the avoidance of ill feeling, and litigation, and the undue elevation of one parishioner over another, is the special object of the advocation; but how far the allowance of the old regulation, as to the seats in the gallery, will conduce to its attainment, (if the supposition of barter, and sale is correct), is at least very problematical. The occupants of those sittings will, as the legal right becomes more understood, be continually annoyed by intrusions, and which it will be impossible for them to rebut. The case of *Blake* v. *Usborne* (3 *Hag. Ecc. Rep.* 732, *supra*, p. 56), sets forth very clearly the right which is acquired in pews in the gallery of a Church, but it is apprehended the right of barter, and sale can in no case be countenanced, for it is positively opposed to all principles of law, and would not give even the *color of a* title.

Mr. Fowler, by the title of his book, may be presumed to have examined into the law of pews, and which makes the argument he has advanced most difficult to be understood; and where he says there were only sixty-four *unappropriated* seats, the argument must be, it is presumed, understood rather as

the assumption of the advocate than the settled, and deliberate opinion of the lawyer, for he must, from his own showing, have been well aware that as the whole of the sittings, with the single exception of the corporation pew, were held under an illegal title, that they were open to the appointment of the churchwarden: and if the free sittings were insufficient to supply the poor parishioners, the others were open to their use. The citation into the Ecclesiastical Court of the churchwardens on refusal (under the circumstances) to appoint, would have been attended with no expense to the poor parishioner, for on the proper suggestion the Court would have appointed both a proctor, and a counsel.

It is also conceived that the (most inconclusive) trial, in Chesterfield Church, of the proposed system; is insisted on as conclusive evidence of the propriety of abolishing pews, in the same spirit as that which dictated the observation above, as to the unappropriated seats. Therefore: it is held impossible, under the circumstances adduced, to say that the poor were excluded the Church, and the proposition must be received rather as an attempt to prop an argument, than as a valid suggestion. It may, perhaps, be said in return, that in effect they were excluded: to which it will be replied, that where the law provides a remedy for a wrong, as it does in

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this instance, there cannot be said to be an exclusion.

If the poor, of whose claims Mr. Fowler appears to be the advocate, had a right, as parishioners, to a seat in the Church; the churchwardens, on application, would have been compellable, as above shown, to provide them sittings in the Church, for the *claims of purchase* would have been disregarded; and if there was only one valid claim admitted, it necessarily follows that the whole of the other sittings were free to the use of the parishioners; and on the appointment of the poor parishioner to the seat by the churchwarden, it is clear that he who claimed by the wrongful title could have no right; and if he persisted in occupying the seat, the appointee of the churchwarden could have cited him into the Ecclesiastical Court, and have obtained an inhibition against his again occupying the seat: Therefore: it is submitted that the argument that there were only sixty-four unappropriated sittings is fallacious, for the law would regard the claim of the poor man, as well as that of the rich, and in the case proposed the churchwarden, on citation by a parishioner, would have been condemned in costs.

It is not shown who were the claimants of the eight hundred and ninety-two sittings in the nave and of the gallery pews, which were allotted when

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the Church was benched, but it may be reasonably supposed that they belonged to the most wealthy and influential part of the parish; and if then the higher class of society in the parish are *specially* provided for, how can it be said that CHESTERFIELD CHURCH *presents* a *fair* example of the *well working* of the *proposed system?*

If the whole of the congregation, as in case of the Temple Church, and the College Chapels, were equals, then the disagreeables which would result from no particular seat being allotted, would be in a great degree avoided, for each being equal to the other there would be no clashing of the conventional feelings of society; and all would doubtless be conducted in an orderly, and proper spirit. But when all grades of society are admitted in equal right to the same seat, then it is apprehended feelings would arise which are the opposites of that propriety of feeling which should exist in a place wherein is supposed to be the actual presence of God; for it is written that "Where two or three are gathered together in my name, there am I in the midst of them."—Matt. c. xviii. v. 20.

For instance, a lady in a white muslin, or light silk dress, being seated in the then free seats, and a sweep, as by the power of the equalization, and the levelling of rights he might, came, and placed

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himself beside her; would she not shrink from the contact? or would she be so absorbed by her religious duties as not to fear the result? In novels, and romances we sometimes read of a state of abstraction approaching that above, but it is thought it will but rarely be found in the actual movements of life.

The actual consequence of such contact would be known to her, and the feelings which she ought to experience would vanish in contemplation of the near and positive ill. And yet, as the seats are open to all the parishioners in common, no one would have a right to remove the sweep; for his occupation is not put under an interdict, and by possibility he may have no clothes unstained by his trade; yet, for his attendance in the parish Church there is an equal need with that of the cleanly, and well dressed; for Mr. Fowler admits, as it must be admitted upon all hands, that poverty, and its too often companion, uncleanliness, is no desecration of the House of God, and would be no plea in bar to the penalties which the statutes inflict.

The rights of the poor, and the hardships with which they are environed, is argued with great feeling; but in advocating this question care should be taken not to overlook the rights which are

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resident in the community generally. And in arguing the case of one class of the community, it should not be forgotten that the other classes of society have an equal claim upon our sympathies; and that there may be as great a tyranny in the *exaltation*, as in the *depression* of the poor.

The supposition above offered is one which would be more than possible to occur in such a state of things as that proposed, and the consequence would be, that the well dressed (not to say respectable portions of the community, for all who conduct themselves properly are respectable in their degrees) would be driven from the Church. And why? Because they could not, on every attendance, afford to risk the spoiling of a dress; and in those cases where the dress would not be spoiled, it would not be agreeable to pass through the streets with a large stain upon it, and possibly accompanied with a disagreeable odour: so again, they would be averse to the continual admixture of classes which the indiscriminate user of the seats would create.

It will, perhaps, be said that such feelings could only result from pride, and that pride is unbecoming in a Christian. Truly; but then we must argue upon the material we have, *which is humanity*, with all its errors, and inconsistencies. The founder of the Christian religion himself respected the dis-

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tinctions of classes; shall then *mere man* go beyond him? And so also did the Creator of the world, or the differences we find in man would not exist; and from the history of man, traced to its earliest periods, such distinctions have existed, and they might be said to be a consequence of the division of labour: for it must be admitted, that one of the primary elements of society, is the division of labour; and in such division some of its offices must be more honourable than others, and therein commenced the distinctions of society: for he who governs shall be more elevated than he who is governed, so he who directs than he who is directed. All must be fed; if therefore the higher are exerting their abilities for the protection of the lower class, it follows as a natural consequence that the lower class shall provide them with proper sustenance; as a recompence for the services they render them. And it may also be said, that the division of labour is necessary for the perpetuation of the species: for it is only the increased facilities which such division affords that enable the numbers to be fed: that sustains the government: and extends commerce. If each man had to provide for his own wants, he would only provide sufficient for his need. It would be useless to grow more corn than he could consume, or to make more clothes

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than were necessary for his use, or to build more houses than he could inhabit; he would have no overplus, at least not more if he were a *provident man*, than would be sufficient for his probable wants; for as there was no barter, there would be no means of getting rid of his surplus. His foresight might extend a season in advance of his want, in case of a failure of the crop, but such provision would be insufficient to provide for casualties. In particular parts there might be a successive failure of crops, and other sustenance, and the inhabitants would then perish; their neighbours could not supply their need, for they have only sufficient for their wants. Admit they could have a surplus commodity, and that they could barter that commodity, and the position contended for is established; *viz.*, that the division of labour is a necessary consequence of society: so the division of classes is a necessary consequence of the division of labour: for the want must have been antecedent to the division: and the distinction of classes, the effect of the division, coupled with increase of numbers.

If these distinctions have existed through all time, and do exist in every modification of society, why should the Church be exempt?—It is said, that in the eyes of God all men are the same; but which must be received with great qualification, for in

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Holy Writ we find that even HE made distinctions: though in one sense it may be true, for the salvation of all was intended by the death of the Saviour.

Perhaps it will be answered, if a person met with a disagreeable neighbour, that he could remove to another seat: truly he might, if the next seat were disengaged, and if disengaged, the same objection might apply; and if it were engaged; and so, through the whole range, then the person would have to pass through the whole range of the seats, disturbing every one he passed, creating interruption and its consequent confusion; which would be an interruption to the orderly progression of the service, and an inconvenience to the person: it might be that this was not a solitary instance, for it would be fair to presume, that many might be placed in the same position; and there is no law to prevent the orderly movement of a person in a Church. If confined to a solitary instance, the interruption would be comparatively trifling, (but yet during the Church service if a book, stick, or umbrella, falls, we find it excites much attention); but if such passing was frequent, or continued in its operation, then the confusion would become important.

In speaking of the poor, Mr. Fowler says, "they are closely tied down in the world by their circum-

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stances, they rarely see the slightest prospect of ever tasting the supposed pleasures of opulence, and power, their life is generally a constant repetition of labour, with old age, or sickness unprovided for in prospect. Is it not desirable that they should be made to feel there is one place at least into which the world, and its artificial relations, and distinctions do not enter—where poverty and mean apparel will not exclude them, and where money and rank cannot purchase privileges. We have a right to expect that the guardians of the Church will exert themselves to make that society an actual type of better and future times, and to receive all comers whether high, or low, rich or poor, within the sacred walls on the same equal terms, on which we are taught they will be received hereafter," (*Ib.* 66). "The principle of spiritual equality between rich and poor, is the very principle of Christianity itself, and to act upon such a principle is the duty of every Christian, and to neglect or violate such a principle is to subvert the fundamental laws of Christianity itself. Christianity acknowledges an aristocracy, but not in pews; respects the privileges of birth, but not in public worship; there men come to abase, not glorify and exalt themselves," (*Ib.* 81, *et seq.*). It is difficult to arrive at the argument intended to be conveyed by the above

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quotation: that the fundamental principle of Christianity is spiritual equality is admitted; but such admission involves nothing in furtherance of the argument in favor of the question at issue.

If A. builds a house, wherein he proposes to worship God by himself, and procures consecration, there is nothing to hinder him from erecting a throne, wherefrom he pleases to worship, or to bid his wealthy fellows to join with him, to the exclusion of his poorer neighbours, and *e contra*, for he may choose only to humble himself before his wealthier neighbours, or only before the poor, as the case may be; wherein then are the *rights* of the excluded portion of society disregarded?

When spiritual equality is spoken of, does it not mean that God will hearken equally to the prayers of the poor as to those of the rich?—What more can it convey, then that prayer, if sincere, will be heard from the privacy of the humble closet as well as from the altar of the gorgeous and turretted Cathedral.—And when it is said, that God is no respecter of persons, it can but mean that he will have an equal regard to the supplications of the lowly, as of the rich—and as the distinctions of society existed when Jesus Christ walked earth as man; had they been wrong, he would have reprobated them; but we do not find anywhere that he dis-

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regarded their existence. He inculcated the care of the poor as a duty, but He never confounded the distinctions of class—He recommended humility, and shewed the spiritual danger of pride; but He never said distinctions should not exist—He said it was difficult for the rich to be saved, but He never said that in the synagogue there should be no precedence—He said the repentant sinner, was more worthy than the haughty Pharisee, but He did not say they should worship side, by side—He knew the peculiarities, the frailties, and prejudices of men; He taught them the road to Heaven, not by doing violence to their conventions, but by reproving their sins—He did not say that all men were equal; and in the case of the tribute money by his answer he showed that he respected the constituted authorities. If He then, who is the great founder of our faith, respected the distinctions of class, who shall say that the classes of society shall be confounded?

How does the case of A. above differ from that of the wealthier parishioners: building, and upholding the structure of the Church, as they do?—Should not the rule in this instance hold, that they who bear the burden should also share the profit? —where then is the injustice complained of?—The poor have it not in their power to erect Churches,

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or contribute towards their repair, but yet they are not excluded; still, they are not to be thrust into the best places in the Church; and in every Church, be it the thronged one of a popular preacher, or that of a remote village, the need of the poor is always provided for; in the one case by open benches, in the other in the unoccupied pews.—Open benches, especially when marked *free*, are spurned at indignantly, as though the word bore the impress of degradation, and insult: and yet the word means no more than a direction to the unappropriated seats.

The prior part of the last quotation has been selected, as a specimen of the arguments produced, in the endeavour to uphold this question; but it is difficult to understand what it means, or to what it points. It is apprehended, if the poor were placed in the position contemplated, no benefit could result, and the contemplation of the supposed pleasures of opulence, would to them be rather an ill than a good, and in ill regulated minds would create feelings wholly in dissonance to those which seem to be expected from the contact.

The merely being seated side, by side, could produce no reciprocity of sentiment: and in practice, however well it may sound in theory, would be most inconvenient: in the case of a country congregation, it would be a thing most disagreeable for

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the poorer neighbour; whilst in towns, the ill taught assurance of the lower classes could create only disgust in the *rich* neighbour, and so in neither case could a benefit result.—A better test of Christianity than making pews in common, is that exerted now in country parishes, at all events in those wherein the minister does his duty; *viz.* the alleviation of the wants of the poorer neighbours by the visitation of the more fortunate holders of this world's goods.

The unprovided old age, and sickness spoken of is too often the result of improvidence; and it is difficult to understand how any gratification, or healing could be afforded the unfortunate persons by an indiscriminate admixture with their more fortunate fellow parishioners.

Such an argument may tend to excite sympathy for the wants, and the distresses spoken of, but can never have weight to overthrow a vested right. A thorough acquaintance with the law which governs the pew right will show it to be administered in a proper, and reasonable manner.—It is such ill judged, and one-sided arguments as are produced to overthrew the right; which tend more to create dissatisfaction, than the most arbitrary exertion of the right would do, for it creates dissatisfaction, where contentment had place before.

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The poor (as a class) are not the persons who would stand forth, and level the distinctions of classes, for such distinctions have existed from the first dawn of their recollections, and it is trusted, will exist during the period of their mortal sojourn. If it be wise, and politic to overthrow the barriers, and restraints of society,—let some other arena be selected than the House of God, for it is not there that men should first exhibit their antipathies, and disgusts; it is not there that the artificial distinctions, or rather the conventions of society, should be torn away with a rude hand: let the experiment be tried, if it is to be tried, amid the realities of life; where men are alive to its impulses, and wherein is the proper stage for their working.

If there was a total, or what would *amount to in effect*, a total exclusion of the poorer members of the community from the Church, then it would be time to give out the eager cry,—a cry, it is feared, which has its impulse but in the selfishness of party. The poor are made the rallying point, and when they have served the turn may perhaps, as is too often the case in the world, be cast aside, and all their claims forgotten.

They are now provided for—they are now respected in their proper walk of life, their comforts are studied, and their distresses relieved from the super-

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fluities of their more fortunate neighbours—I speak not of the poor of towns; for it is feared that the fluctuations of commerce create too often inequalities of circumstances; now abounding in luxury, now aching beneath the iron nerve of the lowest poverty, and either extreme is calculated to deaden the better feelings of nature—on the one hand by the enervations of sensuality, on the other by the temptations which beset a state of abject poverty. I speak not of individuals, but of a class; and which picture it is to be feared will be too fearfully realized in those districts termed manufacturing.—There are individual instances of a contrary conduct, and when it occurs amid the evil of the surrounding example, and temptation, that man is worthy of a place, it must be admitted, with those who are in advance of him in life,—for he would be careful not to offend the prejudices of a class, amongst whom, sooner, or later, he must be numbered. It is of the much more numerous class of poor people which is here spoken of, the denizens of the villages, the agricultural poor, who live on in the same unvarying round of life,—who have grown up with their more fortunate neighbours, and who know all, and are known by every member of their little community.

Occasionally when the purposes of party deem it

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necessary, harrowing instances are held up to the public view of over crowded dwellings, and scanty food; but where that is the case, the cause can generally be traced to the improvidence, or idleness of the individuals.

It is the depraved of the lower classes who (if the desire exists at all), are wishing to be seated with their wealthier neighbours: and if the *desirable distinction* was obtained, would the feelings which it would elicit, turn to the account of the propounders of the theory?—The feelings of the upper classes are not here spoken of; but the unmannered insolence of the lower. In the particular cases wherein a decent propriety of bearing was manifested; in those very cases, and by those very persons; the confounding of the grades of society would be more regretted than desired. What was the comment of Lord Hailes, an eminent Scotch Judge, upon a plea that certain persons had a right to enter a place of public worship and seize any vacant place? did he imagine order would be the result?—It has been thought well to extract his remark, not that it is necessary to introduce his great name to support the argument, but in turning over some works upon Scotch law, the passage casually presented itself, and which was considered so pertinent to the subject, that it was judged to be

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a favourable illustration.—"The plea of the petitioner is, that the inhabitants of the parish are to have the seats at random, and indiscriminately; so that he who comes first to the Church will have his choice.—This might have done very well in former times, when the area of the Church was left void, and people brought their stools with them, which they threw at the minister, if they did not like his doctrine, *but it will not do* in our age. There is no necessity for a particular law, in order to divide the seats in Churches. Good order requires a division, and no better rule can be devised than that which practice has adopted, of dividing by the valued rent: this may be attended with inconvenience, as every human institution is, but this is surely better than that of putting the Churches of Scotland into the state of the communities of the Royal Burghs, which cannot be divided," (*Hailes*, 734).

What are, besides, the argument introduced in support of the theory? assimilation to the Romish places of worship on the Continent?—He says there all are on an equality; if it were the case, it might, in some sense, be produced as a reason, but for the soundness of the proposition, it, unfortunately, is not true, for there the differences of wealth, and poverty are presented in the most palpable shape,

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viz. by an actual money payment for a chair, and which charge is augmented on the festival days, for on those days the throng is expected, and, consequently, those days are the chair lenders' market. When the hired chair occupies the pavement of the Church how does it differ from the fixed pew: is not each a right for the time?—Is it not during user an exclusive enjoyment? But even if this refutation did not present itself, a great reason against the proposed *amalgamation* would be in the difference of the habits of the people. The English perhaps, of all people beneath the sun, are the most cleanly, that part of the community, at least, who regard appearances at all, and the admixture would be feared as much, as the confounding of the conventional feelings of the community; whereas such consequences as would present themselves to an English mind, are never thought of; or if thought of, unheeded, in too many of the nations which crowd the area of the Continent of Europe. There is also much said about the aristocratic exclusiveness of the English people, but it is difficult to understand what weight that could have in the argument, unless to show the positive impolicy of introducing a system, to say the least, which would strike deeply into the prejudices of the community, and have the effect of arousing a most determined resistance;

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and, on the other hand, if the outcry was too great to be withstood, it would be the exclusion of that portion of the community from the parish Church; who bear every burden, and would end in the building of numerous Proprietary Chapels, which would be conducted on the most exclusive principles, and create, between the distinctions of society, an impassable gulf.

The poor, so designated, have now the right or privilege, if privilege it be, of worshipping with their *greater* neighbours, and sharing in common with them the ordinances of religion.

If there could be adduced an argument in support of the proposed system, and a reasonable hope shown of its accomplishment; then the wonder would be less at the proposition; but when Chesterfield Church is produced as the example, and as that which is to show its thorough well working, it is natural that then men should pause, and weigh well the premises: before much, if any, stress is laid on a trial so utterly inconclusive, and imperfect. Where is the admixture of classes which it was produced to show the well working of?—Where are the seats in common to all, when it is said so great is the security of the seats, that persons have provided for them cushions, and hassocks?—Where is the utter equality spoken of?—One luxuriates upon a soft cushion, the other is seated upon

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the bare board. Ah! but then it will be said that the occupant provides them at his own expense. Would not the same answer apply to the exclusive seat in the Church?—The sittings are said to be free, and yet the same individual is allowed to appropriate Sunday, after Sunday the same seat. It is said that the encroachment is never disturbed; if so, where is the seat in common?—If disturbed, and the cushion and the bassock were appropriated by the first comer, would it not create a soreness in the usual occupant, if not a confusion, and perhaps, a most indecorous scene?—The very words of the illustration suggest a doubt, which are, "it is rarely found, &c." (*supra*, p. xix); evidently inferring that, sometimes, it does take place; and it is not presuming too much to say that when it does, the scene is more fit for any place, than a Church.

Chesterfield Church (*a*), viewed in its most favourable light, is no more than a Church which has numerous free sittings without being *marked free*, for all the congregation who can afford to pay, are accommodated in the gallery and in the appropriated portion of the Church. And it is apprehended that, before very long, the utter impossi-

(*a*) It has not been thought necessary to suggest any doubt as to the legality of the mode of seating the congregation in Chesterfield Church, but it is broadly laid down that Parliament only has the power of altering the law with respect to pews.

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bility of carrying out the proposed system will be manifested, and those seats which are now pronounced free, will fall under the usual rules of the common law, or it will end in the erection of a Chapel, as above hinted, and if a license be refused, it will be only opening the door to dissent.

If Chesterfield Church is produced as the Church wherein the most perfect equally exists, so much so as to be called "the poor man's Church," it is presumed the luxuries which wealth can create, should be excluded, or all the seats should be cushioned, and hassocks introduced, or none be allowed (without reference to the gallery and the appropriated seats).

What is the real matter contended for in the advancement of the proposed theory?—It is called a theory, because it is felt to be a project which can never be reduced to practice.

Is it the advancement of religion?

Is it the paving the way for the introduction of Romanism?

Or is it the enslavement of men beneath the yoke of a religious intolerance: under the mask of an universal charity?

It is admitted that pews do not add to the beauty of Churches, but it is difficult to understand how they, more than fixed benches, can be harbours for dirt. If more room is the great desideratum, it can be obtained, where no vested rights interfere, by

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a new arrangement of the seats in the form of benches, if such mode be preferred, and if it be, it is only necessary to close the end with a door, and allow the common law right to take effect, and in reality it is a pew: the provision for the parishioners, generally, is the same, but it is most reasonable that those who bear the burden should, if there is a difference, benefit thereby. The rules of equity leaving every other consideration out of the question, would teach that.

The new district Churches may be almost said to be benched, instead of pewed; St. Peter's, Walworth, for instance; at all events, the enumerated difficulties regarding pews, are greatly got rid of.

As to the beauty of benches: it is to be doubted, if the beauty of the Church is a consideration, whether it would be improved, unless they were of carved oak, or some such material; if so, few are the parishes which could support the enormous expense it would occasion. And if the order was universal to unpew the Churches, and substitute benches, it would be a hardship felt in wealthy London as well as in the remote agricultural districts.

Enter the City Churches on Sunday, and, with few exceptions, what is found? a thin, and listless auditory: would it be a benefit to such parishes to order them to demolish their pews, and bench their Church? And who are the men who would pay

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for this expense—the thin and listless auditory? or the citizens who fill the villas in the outskirts of the metropolis?—Again, visit the villages in the agricultural districts, and what presents itself generally, a dozen unmeaning faces, and an almost empty Church. Where would be the benefit to them?

Visit the outskirts of London, and the manufacturing districts, and what is found there?—Every half-mile a new Church, or Dissenting Chapel, and inside a crowded audience listening to the impassioned discourse of a fashionable, and eloquent preacher. And who are the congregation?—The aristocracy of money, which can afford to purchase talent, and make reproof even palatable because it is couched in the choicest phraseology, and breathed in the silver tones of eloquence. Are the poor forgotten admit these splendid adjuncts?—Are they thrust into corners, or hidden in the dark places of the Church?—Do they not throng the steps of the altar, and are they not seated down the centre passage of the Church?—Have the pew renters much advantage over their poorer neighbours in the space allotted to each?—Do the pews serve as screens to hide inattention, or to court listnessness?—If, then, they come not within the category, WHERE IS THE OBJECTION?

In the new district Churches, which are those last spoken of, by consulting the sections of the

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acts of Parliament enacted for their building, and governance, it will be found that the most equitable rules have been put forth and acted upon: and under the circumstances, those of the common law have been, as far as possible, regarded. And in these statutory enactments, the poor have not been forgotten; and though the benches appropriated for their use are marked free, it carries with it, as before said, no marks of degradation; is as much a direction to the churchwardens not to appropriate as to indicate where the non-renters are to sit. Whilst the word FREE appear upon the seats, the rights reserved can never be confounded; but, as is too often found, unless there is some indication whereby a right may be known, it, in the course of time, is lost by merging into those surrounding it.

Such are the remarks offered in refutation of the theory proposed, and if in any one instance they have the effect of preventing the proposed plan being carried out, (that is, unpewing the Churches and introducing in lieu thereof benches, common to all) the Author will deem himself repaid for his trouble in classing them, for he feels assured it would only end in loosening the proper trammels of society, and would introduce into the House of God, if not actual strife, at least much indecorum and ill feeling.

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THE LAW OF PEWS.

CHURCH.

A CHURCH (a), in a legal point of view, is a building set apart from secular purposes, and dedicated to the public worship of Almighty God. Yet all buildings used for such a purpose are not considered Churches, either by the common, the statute, or the ecclesiastical law of England. Church, what.

It is governed in a peculiar manner, and has dignitaries, officers, and privileges, annexed thereto, which privileges have grown up by usage, or have been conferred by grant or statute. "The first mention we meet with of Churches in England, is about ANNO DOMINI 700, when the Saxons in large districts founded them for themselves and their tenants, and which were the original parish Churches. Within those districts others were afterwards erected; which, in the process of time, have obtained Churches, founding of.

(a) The word "Church" means only the body of the building, and any public Chapel annexed thereto: it extends not to a private Chapel, though it be fixed to the Church, for he who has the profit should bear the burden. [illegible] *Law*, 357.

tithes, burials, and baptism, and thereby became parish Churches.[n]—(*Com. Dig.* '*Esglise*' (C)). Selden, (from whom Comyn quotes), writes that every Church having tithes, burials, and baptisms, may be esteemed a parish Church. However true such a definition may have been, it is not so in the present day, for we meet with places of public worship which enjoy all these privileges, and yet are only Chapels of Ease, (*infra*), as they are termed, being in some way subservient to the mother Church, either by the right of the presentation being in the incumbent of the parish, or he receiving some emolument as a composition for the cession of his rights.

Chapel of Ease.

Districts.

England was long before its division into parishes (*b*), divided into districts, which were immense tracts of a thinly peopled country divided from each other by large moorlands or dense forests. And it is a fair inference to presume that as population increased, so were the

(*b*) A parish was formerly a precinct within a diocese, which comprehended one or more vills or lesser territories, for several may be contained in one parish, and every precinct which belongs to the same parish Church constitutes a parish (*Com. Dig.* "*Parish*," (B. 1)). So it must have a Church, churchwardens, and sacramentalia; but if it had not a parochial chapel, wardens, and sacramentalia at the time of the stat. of the 43rd of Eliz. c. 2, it is not a parish by reputation within the meaning of the statute, though it had a distinct overseer, maintained its own poor, and a warden by whom the rates were collected and paid to another parish (*Ib.* (B. 2)).

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religious wants of the people found to be more pressing, and the Churches too few, or the distance of parts of the district inconvenient: or it might have been, the districts being in some instances, comprised of several lordships, the jealousy of their heads induced a severance. And as "each baron claimed the right of building a Church on his own soil," (*Com. Dig.* "*Eglise*" (A)), "and the consecration of the tithes being generally arbitrary," (1 *Blac. Com.*), they obtained or wrung from the ordinary his consent, and "obliged all their own tenants, in order to have divine service regularly performed in the newly-built Church, to appropriate their tithes to the maintenance of the officiating minister, 'instead of leaving them at liberty to distribute them among the clergy of the diocese in general,' (1 *Blac. Com.* 114); and these tracts of land, whether they were manors or lordships, formed a distinct parish; and which supposition is born out by the fact that a manor rarely, if ever, extends into more than one parish, though in a parish one, two, or more manors are often found, (1 *Blac. Com.* 114, (*c*)).

Parishes, division into.

"Though gradually the kingdom became meted into parishes, yet there were some spots, either because they were situated in desert and remote places, or because they were in the hands of

Extra parochial places.

(*c*) The variations to this rule exist more especially in the neighbourhood of the city of London than elsewhere.

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careless or irreligious owners, which were never united to any parish, and continue to this day extra-parochial. And their tithes are now, by immemorial custom, payable to the king instead of the bishop in trust, that he will distribute them for the general good of the Church," (*Blac. Com.*).

It is not necessary for the elucidation of the subject-matter of this Treatise, here to pursue further this inquiry, or to show how the tithes, in many instances, were lost to their intended owners; whether by a superstitious veneration, by purchase, or by bequest, and became appropriated to corporations or individuals—on the one hand by the avarice of ecclesiastical bodies, on the other by the downfall of these ecclesiastical associations on the dissolution of the monasteries, and the grant to laymen by the sovereign: of the domain, the rights and the privileges which were annexed to them.

ECCLESIASTICAL PERSONS.

Endowment of Churches.

When Churches, as we have seen (*supra*, p. 1), were first endowed, they had the tithes annexed to them, and the incumbent was what was termed a parson or "*persona ecclesiæ*," because he takes upon himself the person of the Church, and is seised in right of his Church. "That in his person the Church might sue for and defend her

Parson, what.

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right, and also be sued by any that have an elder title. (*Wood's Inst.* Bk. 1, c. 9, p. 30; *Com. Dig.* "*Eccl. Pers.*" (B 9), *S. P.*)

Rector, what.

Parson is a word used as synonymous with that of rector, though *Watson*, in his *Clergyman's Law*, says, "he is the complete incumbent," meaning, it is apprehended, he who hath the spiritual cure and the temporalities. Comyn treats them as the same, and says, "he is the rector of a parochial Church; and that a rectory or parsonage consists of glebe, tithes, and oblations for the maintenance of a parson, or rector having a cure of souls in the same parish, and there need not be more glebe than the soil of the Church, or the church-yard, but there ought to be some land: for if tithes only be proved, it is not a rectory." (*Com. Dig.* "*Eccl. Pers.*" (C 6)).

Rectory, requisites of.

Vicars, institution of.

When the monasteries obtained the livings into their possession, or when, in other words, a Church was appropriated, it was usual to endow a perpetual vicar with a cure of souls, though it was not necessary (*Jones* v. *Ellis*, 2 *Y. & J.* 272. *Com. Dig.* "*Eccl. Pers.*" (C 10, *S. P.*)), and, in some instances, the churches were not served at all, and, in others, the officiating minister was so miserably cared for, that it became necessary for the Legislature to interfere.

Vicar, common law right.

It was therefore enacted by the 15 Ric. 2, c. 6, and 4 Hen. 4, c. 12, that the appropriation should be void if a perpetual vicar was not instituted and inducted into the same Church, and conveniently endowed. Before which time the

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vicars were the mere servants of the monasteries to which the rectories were appropriated, and had no rights whatever. The 14 Edw. 3, c. 17, gave them a right of action for the recovery of land which had been given the vicarage in alms, and then followed the 15 Ric. 2, (2 *Y. & J.* 272).

The parish Church and church-yard are the freehold of the parson, but he hath not the fee-simple, for that is not in any one, being always in abeyance (*Wood's Inst.* bk. 1, ch. 3), he could not have had a writ of right. (*Com. Dig.* "*Eccl. Pers.*" (C 9)).

But for the benefit of his Church and successor, he shall be reputed to have the inheritance *quodam modo*, and, therefore, he may have waste, and declare *ad exhæreditationem ecclesiæ*. (*Com. Dig.* "*Eccl. Pers.*" (C 9)).

Statute right.

By the common law, the vicar had not the freehold of the Church, or church-yard, nor could he have had a *juris utrum*, for his glebe, nor be named tenant to the *præcipe* for his glebe without the parson: yet after, by 14 Edw. 3, c. 17, he might have had a *juris utrum* for lands, &c., of the vicarage, and recover in other writs as a parson might have done; he stands liable to the repairs of the Church, and shall have the trees in the church-yard. (*Com. Dig.* "*Eccl. Persons*" (C 14)).

Trees in church-yard.

Right to the freehold of chapels in parish.

In *Jones* v. *Ellis*, it was said to be difficult to support the generally alleged presumption of law, that the vicar has in him the fee and the *quasi* inheritance of all the land on which any

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Church or Chapel is built within the parish, and of the buildings erected thereon, and that the statutes above recited confer certain rights; yet none goes so far as to confer the fee of such Chapels as exist in the parish upon him. By the common law the general language is, that the Church, the church-yard, and the glebe, belong to the parson, which gives a more plausible claim to the impropriator than to the vicar, 2 *Vesey, sen.*, 145, only proves that a vicar may have the nomination to a perpetual and parochial curacy, but whether he has, or has not, depends upon circumstances. In *Dixon* v. *Vershaw*, reported in *Ambler*, Lord *Northington* supposed that the incumbent of a parish having a cure of souls, had the right to nominate a curate to a Chapel of Ease; neither of which propositions aid in establishing that the soil and fee of the Chapel is in the vicar (*Jones* v. *Ellis*, 2 *Y. & J.*, 272, *et sequitur*, *Alexander*, C. B.).

Curate.

A curate is the lowest officiating minister in the Church, being in the same state a vicar formerly was, officiating temporarily, instead of being the proper incumbent.

A perpetual curate is he who officiates in a living, wherein all the tithes are appropriated and no vicarage endowed (being for particular reasons exempted from the stat. of Henry 4th). Such curate is appointed by the impropriator (1 *Bl. Com.* 393). The ministers of augmented Chapels are also perpetual curates. 1 Geo. 1,

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c. 10, s. 4; 36 Geo. 3, c. 83, s. 3. He may be a mere stipendiary (*Duke of Portland* v. *Bing*, 1 *Cons. Rep.* 166). A perpetual curacy conveys an interest for life, unless deprived by the ordinary in the proper course of law (*Brereton* v. *Tamberlane, temp. Hard.* 1752, 2 *Ves. sen.* 425).

Line v. *Harris*, 1 *Lee*, 146, Sir *J. Lee*]. And though by common right, the nomination of a curate to a Chapel of Ease is in the rector or the vicar of the parish, yet by custom or composition it may be in other persons (*Ib.* 156). "The 1st of Geo. 1, capacitates curates belonging to the Mother Church to be augmented by the Queen Anne's bounty, and to be subjected to a lapse on non presentation (*Ib.* 157). The Chapel is built upon the ground belonging to the corporation, and is supported and maintained in every way by them. The curate and the clerk receive their salaries from them, and not from the inhabitants of Saltash generally, who have the benefit of the use of the Chapel. It is reasonable, therefore, to conclude the corporation builded it, and the right of the nomination of the curate was granted to the corporation by composition."

SEATS IN THE CHURCH.

The body of the Church.

The use of the body of the Church, and the maintenance or repair of the Church and the

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seats, belong to the parishioners (*Gib. Cod.* 221), by the custom of England (*Wood's Inst.* bk. 1, c. 3, p. 31), and of common right. "This ought to be done at the charge of the parishioners, because they have the benefit of worshipping God in the Church, and burying their dead in the church-yard. The parson (*quære incumbent*) only has power to give leave to bury in the Church, but the churchwardens must be paid for repairing the floor," (*Wood's Inst.* bk. 1, c. 3, p. 89; 1 *Watson's Clergyman's Law*, 709).

Seats, general rule of law.

The disposal of the seats (*d*), *in nave ecclesiæ*, or the body of the Church, belongs to the ordinary (*e*), and generally he may place or remove persons there at his pleasure (*Com. Dig.* "*Esglise*," (C 3)).

Ordinary, who.

Such is the very general rule of law in respect to seats or pews in the body of the Church; but which if acted on in its literal and obvious sense would cause nothing but ill will and litigation from one end of the parish to the other, creating confusion and prevent-

(*d*) Seats are built for the ease of the parishioner to sit, kneel, or stand in for hearing the word of God read or preached, and joining in prayers with the other parishioners, and are built at the general charge of the parish, unless particular persons are chargeable (*Degge Parson's Counsellor, by Ellis*, 7th Ed. 209).

(*e*) The ordinary (*ordinarius*) is a name taken from the canonists, and is applied to a bishop, or any other person that hath ordinary jurisdiction in causes ecclesiastical. He is so called, *quia habet ordinariam in jure proprio et non per deputationem.*—*Co. Litt.* 96, a.

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ing, (from the confliction of the claims of the supposed rights of one parishioner and another,) the orderly administration of the public duties of religion, and that external decorum so necessary for the maintenance of a reverential feeling towards that Being, the worship of whom is the presumed object of the assemblage, and before whose throne they, by appearing in such a place, have consented to lay all their bickerings and strifes.

The real and proper province of the law, is the prevention of such a state of things as those above adverted to, and to which decision after decision has conduced, until the rights of all, special as well as general, are clearly defined.

We shall *first* treat of the general right which every parishioner has to a seat, and whence a possessory title may be derived, and in the second place, of special rights; *first* of a faculty, and *secondly* of a prescription which supposes a faculty. It will be also necessary, in order that the seeming inconsistencies of many decisions may be accounted for to show the division of the structure of the Church into nave, chancel, aisles, and sometimes private chapels; which two last are supposed to be additions to the original building; and also to show in what part of the Church the general right usually exists and is exercised, and how the chancel and the aisles have generally become annexed to particular estates; and *lastly* of Chapels, which in some cases fall under the common rule of law, and which in others are governed by particular circumstances.

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POSSESSORY TITLE.

Fuller v. *Lane*, 2 *Add. Ecc. Rep.* 426]. "By general law and common right all the pews in a church are the common property of the parishioners, who are entitled to be seated orderly and conveniently, and neither the minister or the vestry have any right to interfere with the churchwardens in seating the parishioners (*f*), (1 *Phill.* 323; 3 *Hagg. Eccl. Reports* 733, *S. P.*), for such right is with them subject to the control of the ordinary, though the advice of the minister and the vestry, &c., may be invoked, and, to a certain extent, be reasonably deferred to.

Seats, apportionment of.

Minister and vestry right to interfere.

The duty of the churchwardens is to look to the general accommodation of the parishioners, and consult, as far as may be, that of all the inhabitants of the parish who may claim to be seated according to their rank and station, but in such provision they must not overlook the claims of other parishioners, if seats can be afforded them, so they must not accommodate the great above their real wants to the exclusion of their poorer neighbours."

Claim according to rank.

Bayley, J., in giving judgment in the case of *Byerly* v. *Windus*, quoted Sir *J. Nicholl's* judg-

(*f*) Before the Reformation there were no fixed seats, nor any distinct apportionment of the Church set apart to particular inhabitants, except to some very great persons. The seats were moveable and the property of the incumbent, and were in all respects at his disposal; it was customary (*i. e.* usual) to bequeath them to their successors and others, as they thought fit. *Johns.* 175, *et seq.* *Kew. Parl. Aut.* 596.

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ment in the above case, and in almost the words he used, (7 *Dowl. & Ryland*, 564).

Possessory title subject to alteration.

Parnham v. *Templar*, 3 *Phil.* 522]. "The use of the pews belongs to parishioners, and are allotted by the churchwardens subject to the control of the ordinary, but such allotment does not give a permanent and exclusive right; it is liable to alterations as the circumstances of the parish require, and the churchwardens may remove persons originally seated or their descendants; but if they do so capriciously and without just grounds, the ordinary will control and correct them."

Right to change sittings, and dispose of them.

Arbitrary exertion of the right.

Prohibition.

Astley v. *Biddle and Ripley*, 1774, *in Notis*, 3 *Phil.* 515]. "The right is in the churchwardens, both in London and elsewhere, to dispose of pews, for the convenience of the parishioners and the preservation of quiet, but it must not be executed arbitrarily; if the churchwardens interfere to take away a seat, and they take it to themselves, the ordinary will interfere, and they may not unseat a parishioner on refusal to pay for a pew if they do suit, for perturbation will lie, and they will be condemned in costs."

Parishioner, who.

Brooks v. *Owen*, 1718, *ib.* *Drury* v. *Harrison*, *ib.*]. "A man, if his house of trade be in a parish, may be a parishioner, though he lives in another parish; so by occupation of a farm he may, though he does not occupy a house."

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Jeffery's case, 5 *Rep.* 63, b.]. "A man having lands in a parish in his own proper possession and manurance, is in law a parishioner, for by manuring lands in the parish he was by that resident upon them, and was therefore a parishioner as to this purpose (this case was an appeal against the payment of a Church-rate, parishioner not being resident)."

Woollocomb v. *Ouldridge*, 3 *Add. Eccl. Rep.* 2]. "It is immaterial whether the parishioner occupies the whole building or is rated upon the books of the parish, or whether landlord is, for he is of course repaid the rates in the shape of additional rent."

Incumbent power to seat.

Tattersal and Knight, 1 *Phil.* 232]. "An incumbent has no authority in seating and arranging the parishioners beyond that of an individual member of the vestry. He may object to a plan which is generally inconvenient, and which diminishes the accommodation or disfigures the building, or renders it inconvenient or dark, in which case he should make representations to the ordinary," (*Ib.* 234).

Wills of incumbents relating to pews.

1 *Burn's Eccl. Law*, 358; *supra*, p. 11, *in notis*]. "The many wills of incumbents are to be seen wherein they bequeathed the seats in a Church to their successors and others, as they thought fit."

Pews, in whom.

Morgan v. *Curtis*, 3 *Man. & Ry.* 387.

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Bayley, J.]. "Yet the right to the pews is virtually in the ordinary, and exercised by means of the churchwardens, and they place the parishioners in the different pews."

Church-warden's right to place.

Reynolds v. *Monkton*, 2 *Moo. & Rob.* 385, *N. P.*, *Rolfe*, B.]. "The churchwarden has a right to exercise a reasonable discretion in directing where the congregation shall sit, and if he uses no unnecessary force, he has a right to remove a person from one seat to another seat." In this case, a person, a parishioner, insisted on disturbing another parishioner, who occupied a pew by the appointment of the churchwarden, who, on complaint, went and attempted to remove the intruder by placing his hand upon his shoulder. (This was an action of trespass against the churchwarden for so doing, and the jury gave damages, 10*l.*")

Exercise of.

Intrusion, justification of.

Turner v. *Giraud*, 3 *Phill.* 538]. "In a case of intrusion into a pew, shewing being placed there by churchwarden, is a sufficient authority; the house, in respect of which the claim is made, being entitled to a pew."

Pew, when it reverts to parish.

Wylmer and Mott v. *French*, 1 *Add. Ecc. Rep.* 40, *et seq.*, Sir *J. Nicholl*]. "When a pew is allotted by a churchwarden to a parishioner; on his quitting the parish, it reverts back to the parish, and though he lets his house, he does not therewith let the pew. The new tenant should apply to the churchwarden to be seated,

New tenant to a house in parish to

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for the pew may be larger than his wants, or inadequate to them. which no pew is appurtenant.

"An appropriation to a house can only be by faculty or prescription; but if a tenant continues in the possession of a pew by long acquiescence of the churchwardens, his wants being equal to the pew, his removal by the churchwarden would be illegal, he not quitting the parish, and they having no reason to believe he was about to do so. It is an insufficient reason that they supposed the pew was allotted to another house." Long possession of a parishioner.

In *Stock* v. *Brooks*, 1 *T. R.* 428, it is said, "that a seat in a Church belongs not to the person, but to the house;" which *dictum* must be received with great caution. Pew appurtenant.

All the decisions tend to establish, as in the case above, in 1 *Add. Ecc. Rep.*, that though the pew is allotted to the house, it is so for the accommodation of the *individual* and his family, so long as he continues an inhabitant, and his wants are equal to it; but when he leaves the parish, the pew reverts back again, and is open for the appointment of the churchwardens; it does not pass as of right to the next tenant (unless it is annexed to the house by faculty or prescription); so if his family increases, and his wants lessen, the churchwardens may place other parishioners in the same pew with him, regard being had to the rank of the occupants, (*infra*, p. 20). Placing several families in same pew.

2 *Roll. Abr.* 288]. "A possessory right to a Possessory right.

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pew, that grandfather whose estate he hath, possessed it twenty years, and he succeeded to it, held good, against a mere disturber."

Process for not seating parishioner.

Walter v. *Drury*, 1 *Consist. Rep.* 316, Sir *W. Scott*]. "A process was issued against a churchwarden to compel the seating of plaintiff, and in citing churchwarden, it was held not necessary to allege, that any part of a pew was vacant, an averment on the part of the churchwarden of inability to comply with request, because of no vacancies, would be sufficient.

Condition to pay money to erect a pew.

"Averment of a condition to erect a pew on payment of a sum to the parish would be bad, the consideration being illegal.

Improper filling of pews.

"If existing pews are improperly filled, it is a bad return to say none are vacant; so also, that the pews are appurtenant to houses, and are let by the owners to persons not inhabitants of the parish; for all private rights must be held under faculty or by prescription, and no faculty was ever legally granted to that effect, for if so, the ordinary must have exercised his discretion for the depopulation of the Church of its proper inhabitants, (*Ib.* 317).

Duty of churchwardens.

"The churchwardens should prevent improper occupancy; if they do not, they do not do their duty," (*Ib.*).

Sale of pews.

The allegation of a custom for those who have not pews as appurtenant to houses, to pay rent for seats, and which rent is to be applied to the easement of the parish rate, is a practice which

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is to be constantly reprehended by the Ecclesiastical Court, and discouraged as often as set up, (*Ib.* 317, note (*a*)). Every man who settles as a householder in a parish, has a right to call on the churchwarden for a reasonable seat, (1 *Consist. Rep.* 188), and that without payment, (1 *Consist. Rep.* 317).

Right to seat, without payment.

It is a wild conceit (*vide infra,*) to suppose that there can be such an use made of pews as there can be of villas or other property (*Ib.* 321, see *contrà, Watson C. L., citing Corven's case,* 12 *Coke,* 106), and though a condition of sale be contained in a faculty it is illegal (*Stevens* v. *Buller, in notis, Ib.* 318). Held, claim on such grounds is invalid. Neither parishioners by consent, or ordinary, or any power but the Legislature, can deprive the inhabitants of a parish of their general right, and such acts are contrary to the law of the land, (*Harford* v. *Jones, Ib.*). So also a grant by a vestry for 10*l.* of a pew to A. and his assigns, appointed to such a house as he should build, and he assigned to B.

Property in pews, what.

Condition of sale in a faculty effect.

Payment for a pew.

Grant for money of a pew to a house not *in esse.*

Mainwaring and Giles, 5 *B. & A.* 361. *Abbott,* C. J.]. "In no case has a person a right to the possession of a pew analogous to the right which he has in his house or land, for trespass will lie for any injury to the latter, but for intrusion into the former, action is upon the CASE which furnishes a strong ground for thinking that the action is maintainable only on the ground of

Pew right, what.

Remedy for disturbance of right.

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the pew being annexed to the house as an easement."

"For a pew in the body of the Church (and not in the chancel which might be the freehold of an individual) no action at common law can be maintained for a disturbance, because the pew is not annexed to any house, disturbance is a matter for ecclesiastical censure only, a mere right to sit in a particular pew is not such a temporal right, as in respect of it an action at common law is maintainable," (*Holroyd*, J., 362).

Allotment of a pew by the vestry.

Fuller v. *Lane*, 2 *Add. Ecc. Rep.* 424]. "Memorandum by order of vestry; in consideration of A. presenting an altar cloth, and of B. his wife, presenting a salver for use of the communion service, that A. should have for his own use, and the use of his family, a certain seat or pew adjoining the pulpit of which exclusive possession was enjoyed one hundred and eleven years, when the estate in respect of which the pew was held, was sold. The question was, whether the pew should go to the purchaser, or to a descendant, who had sat in the pew for eleven years as a visitor only, and in which time she had done some repairs, and (during which time the estate was in the family), the descendant was the wife of a solicitor resident in London, and who at such time was mortgagee of the estate, and in treaty for its purchase; another descendant, late possessor of the estate, claimed in right of the memorandum of the vestry, and,

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on his quitting the parish, pretended to confer the right on the demandant his sister."

On the vendor leaving the parish, his right to the pew reverted to the parish, and became liable to disposal by the ordinary. ("The demandant's husband purchased some land in the parish, and built a house thereon, which he inhabits.")

Allotment of pews by sale.

Wilmer and Mott v. *French*, 1 *Add. Eccl. Rep.* 28, Sir *J. Nicholl*]. "The allotment of pews by purchase and sale (*Ib.* 38), and subsequent transfers by bequests and lettings, gives no legal title to them (*Ib.* 29, 30). Payments for pews can, therefore, form no ground of title, and must be considered as voluntary contributions and subscriptions towards the building. It may be a reason for the churchwardens exercising their discretionary right, and such seating may give a possessory title sufficient as against a mere disturber. The sale and purchase rather operate against the claim, for if a person seeks to found his title on an illegal origin, it goes far to justify his removal (*Ib.* 30). A statement of payment of money for a pew is bad, the title should be founded on the seating of the churchwardens (*Ib.* 31), and if the churchwardens, with a view to put an end to illegal letting, dispossess a person, and place him in another pew equally commodious and good, it might not be improper, (*Ib.* 32).

Sale and purchase of pew, effect.

Removing person to end illegal letting.

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"If the population of a parish be increasing, no pew ought to be put out of the power of the churchwardens, and if the chief inhabitant has a pew (allotted) too large for his wants, the churchwardens may place other persons in the pew with him, but this must be done only in cases of very strong necessity," (*Ib.* 41).

Placing two inhabitants in same pew.

Custom for parishioners to allot seats.

A custom, time of mind of disposing (in allotting) of seats by the churchwardens and the greater part of the parishioners, or by twelve or any particular number of the inhabitants, is a good custom (*vide infra, contrà*), and if the ordinary interposes, a prohibition will be granted, and Dr. Gibson quaintly concludes, "which he humbly hopes will be observed by ordinaries and incumbents to the end, that such private practices and bye-laws may not, by long contrivance, grow so strong as to make head against the ecclesiastical jurisdiction," (*Gib. Cod.* 222).

A prescription by the parishioners to dispose of the seats without the interposition of the ordinary, will be void, (*Com. Dig.* "*Esglise*" (G 3)).

It has been held, that the seats in the body of the Church are disposed of by the parson and the churchwardens (citing *Moor*, 878), but this must be understood where there is no contention or dissatisfaction about the matter. It may be by custom, for the churchwardens to allot the seats, as in London and some other places. But some reason must be shewn why it should be so,

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for a mere general allegation of repair and building by parishioners, is insufficient to take away the ordinary's power, because this is no more than they of common right are bound to do, (*Watson's Clergyman's Law*, 711), though Dr. Watson much doubts whether the ordinary had anciently the power of disposing of the seats in that part of the Church which the parishioners repair, (*Ib.* 715).

Vestry power to let pews.

Spy v. *Flood*, 2 *Curteis*, 365, *et seq.*]. "Where an act of Parliament expressly gives power to the vestry to let the pews, or any of them, excepting the free seats of the poor, they may let all but them, and, by consequence, remove the rector from one of two pews he possessed from the time of his induction, and let it to another qualified person, for the statute law is binding upon every Court, and no worse justice is administered than to depart from the plain and simple words of a statute."

Possession.

Stocks v. *Booth*, 1 *T. R.* 436]. "In an action against a wrong doer possession may be *primâ facie* a sufficient title, and it is not necessary to set forth so strict a title as against the ordinary, it was held sufficient laying the pew as appurtenant to a house, but it must be taken as legally appurtenant, which can only be by faculty or prescription. A bare possession never can give a right, because each parishioner has an equal right to go into the parish Church,

Action against a wrong doer.

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and a complete title can only be gained by application to the ordinary for a faculty, or to the minister or churchwarden to allot a seat, but if he takes not such trouble he cannot maintain such an action, even against a wrong doer, because he must set forth that the pew is appurtenant to a messuage in the parish." (*Ashurst*, J.).

Declaration against wrong doer.

"Trespass will not lie in an action on the case for a disturbance, the plaintiff must prove either faculty or prescription; declaration for disturbance of a pew as annexed to a messuage in the parish, is sufficient against a wrong doer, for such right would have been colourable," (*Ib.* 431. *Buller*, J.).

"Trespass will not lie because plaintiff has not the exclusive possession, the Church being in the parson," (*Ib. Bayley*, J.).

Possession, how abandoned.

3 *Add. Ecc. Rep.* 7]. "A possessory right is only co-extensive in duration with actual possession, if abandoned it ceases and determines, which determination will be shown by him who had the possession, acquiescing in another person sitting in the seat for a year, and then applying for another seat."

Perturbation against a disturber.

Pettman v. *Bridger*, 1 *Phil.* 324, Sir *J. Nicholl*]. "Possession is sufficient to maintain a suit against a mere disturber, for possession shows an actual or virtual power to place, and the disturber must show his placing by this authority, or by showing a faculty or prescrip-

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tion, a right paramount to that of the ordinary himself."

Kenrick v. *Taylor*, 1 *Wils.* 327]. "In a possessory action against a stranger and mere wrong doer the plaintiff is not obliged to prove any repairs done by him or them whose estate he hath, for it is a rule of law that one in possession need not show any title or consideration for such possession against a wrong doer, but as against the ordinary it is otherwise, for he hath the disposal of all the seats in the Church, and against him title must be shown in the declaration, and proved as building or repairing."

Possessory action against a stranger.

Against ordinary.

Parnham v. *Templar*, 3 *Phil.* 526]. "A possessory right ceases when use and occupation cease."

Gib. Code, 222]. "Possession, which is a *primâ facie* right, is a sufficient ground of action, and repairs need not be alleged."

Against wrong doer.

Byerly v. *Windus*, 7 *Dowl. & Ryland*, 591, *et seq.*]. "Case, action for disturbance. Defendants had built pews in the body of the Church by the permission of the churchwardens (being a corporation and extra parochial); they built and repaired the same, and had been in occupation 100 years. On a general repair of the Church these pews were removed, and others were placed there for the general accom-

Claim by persons extra-parochial to pews in body of Church.

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modation of the parishioners, the church room being confined."

The judgment of the Court was delivered by *Bayley*, J. "The claim to the pews is partly prescriptive and partly possessive, and the question is, whether a possessory right could exist in these parties independently of a prescription or immemorial custom to enjoy them; they being non-parishioners it is quite clear they can have no right to a pew in the body of a church without prescription; the body of the Church belongs to the parish, and the parishioners at large and the ordinary has no right to dispose of seats to those who do not reside in the parish; we are, therefore, of opinion that the defendants can have no right to the pews they claim, but by prescription," (*vide infra*).

Evidence of right.

Cross v. *Salter*, 2 *T. R.* 639. Lord *Kenyon*]. "A libel was exhibited in the Consistory Court for a perturbation, and the Court adjudged the right to be in the plaintiff, and admonished the defendant not to sit in the pew. The Court of Arches reversed the sentence, but admonished the defendant not to use the pew again. These sentences were held not to be conclusive evidence of the plaintiff's right in an action at common law for a disturbance between the same parties."

General right of parishioners to pews.

In the cases cited has been pourtrayed the general right and interest which every parishioner

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possesses in the parish Church, and which he by the common law is bound to repair, and though the parishioner has a right to a seat in the parish Church for the purposes of public worship, still he must not enjoy that right in a rude and tumultuous manner, for such an exercise of his right would be an infringement upon that of others, and contrary to the public polity of the realm (*g*). To prevent such a display, the power of placing the parishioners is vested in the ordinary, and exercised by the churchwardens, who for such a purpose are his officers, and though Dr. Watson (*supra*, p. 21) doubts whether the ordinary had the power to exercise such a right in ancient times, yet as he has the spiritual

Appointment, in whom.

(*g*) In note (*supra*, p. 11) it will be seen, that though formerly the Churches were not pewed, still there were moveable seats, and which, except in particular cases, were not appropriated. It must be remembered that the time there spoken of, was when society was very differently constituted to what it is in the present day, and besides which, population was very much less extensive. Then rank was reverenced, and, more than all, the awe with which, under the Romish sway, religion inspired the minds of the commonalty was more than sufficient to counterbalance the evil of there being no fixed seat for each individual. In that time a disturbance in a Church, by scuffling for a seat, would not only have been deemed an act of impiety by the congregation, but would, most probably, have been visited with ecclesiastical censure; but in these times such feelings do not exist, or, at all events, could not be calculated upon for the purpose of keeping of order, and if the seats were thrown open, as in some places it is insisted upon (however illegally), it is feared the observations in the text would at the least be verified.

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care of the diocese, it is obvious that he must be the person most concerned to keep order, and at least the appearance of external decency in the administration of the public worship.

Right of disposition by ordinary, how acquired.

Whether the right is one coeval with the first apportionment of Churches into pews, or has been usurped or conceded, from its apparent necessity, it is not our business here to inquire; it is sufficient for our purpose to know that the placing the parishioners in the parish Church according to their degree, having a due regard to the wants of all, is a right which the ordinary, in the persons of the churchwardens, exercises, and one which is recognised by law, and is, it is conceived, sanctioned by reason.

Possessory right.

When a seat has been allotted to a parishioner, he has in that seat an exclusive right so long as he continues a parishioner, and his wants are adequate to its use (*supra*, p. 12). The ordinary alone has the power of removing him, which, however, is only to be exercised for a sufficient cause, and he is subject to the supervision of the Ecclesiastical Court, which would curb any wanton display of power, and unless the Court was satisfied that the cause of disturbance was a reasonable one, would, no doubt, condemn the ordinary in costs. Though by the appointment of the ordinary the parishioner gains a *quasi* right to his seat, it is one which must succumb to the general convenience; and though among the cases cited, it was decreed

Power to remove parishioner from allotted seat.

Ecclesiastical Court, supervision of ordinaries' power.

Right gained by appointment of ordinary.

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that the grandson should succeed the ancestor whose estate he hath, and who had held the pew for only twenty years previously to his death, yet such decree is not to be taken for the general rule, for we find in *Fuller* v. *Lane*, (*supra*, p. 18) that one hundred and eleven years was held insufficient to confer such a title as would enable the possessor on selling his estate to convey his seat to his sister, also a parishioner; and that even though she sat in the pew eleven years, and during that time repaired it, the pew in the first instance being apportioned by the vestry, a memorandum of which was extant in the minute book.

Time sufficient to confirm possessory title.

Again, in the case of *Byerly* v. *Windus*, occupation for one hundred years, building the pews and repairing them during that period, was held insufficient to confer even the right of sitting in the pews, which the parties (a corporation) had builded, the claimants being resident in a spot of land which was extra-parochial, and surrounded on all sides by the parish.

So, again, the parishioner who sold his house could not with it convey the right of sitting in the peculiar pew which he had occupied, for the possessory right with which the parishioner is clothed by the allotment of the ordinary is one which arose out of the circumstances of his position, and was to him a matter of convenience; and though it was to him a matter of convenience, it does not follow as a necessary consequence that it would be to his successor, for the

Right to convey seat on sale of house.

Possessory right argument against right of sale.

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pew might be more than his wants demanded, or insufficient for them; in the one case, a curtailment of the rights of his fellow parishioners, in the other, an inconvenience to himself.

If the seats so obtained were allowed to be transferred *as of right* with the messuage, it is more than likely a prescription would spring up, which by long user would end in being a title paramount, even to that of the ordinary.

Allotment, title of parishioner.

On the appointment of a parishioner to a seat, he has a title against all persons but the ordinary, and any one who disturbs him therein, though he may not be punished by an action at common law, yet he may be by citation into the Ecclesiastical Court, and be made defendant in a suit for perturbation.

Possessory right, ingredients of.

In determining whether a person has a possessory right to a pew, the main considerations of the case are, is he a parishioner, and has he the appointment of the ordinary? A mere admonition from the Court (Ecclesiastical Court) not to sit in a pew again (upon an action for perturbation) is insufficient to determine that the pew is in the person bringing the suit (*Cross* v. *Salter*, *supra*, p. 24), but if the Court positively decrees the pew to be in the party, then it will be considered as an evidence of his right.

Occupation it is apprehended, is also a most important ingredient in the consideration of the case, and though none of the cases go so far as to say the appointment shall be avoided by non-user, yet the wants of the person being the inducement

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to appoint, clothed as it is with a kind of right, the failure of the person to occupy tacitly showed he had not the want, and therefore the consideration failing, the appointment would be void; besides, he has only in common with his fellow parishioners a right to a seat, his bare appointment, therefore, in some sense, acts as a hindrance to the others in the enjoyment of their rights.

Failure to occupy allotted seat.

If such was the law (*i. e.* occupation without user) and if such a course of conduct might be persisted in and acted on with impunity, the Church would eventually be depopulated, and the institution of the minister be rendered of none avail.

The duty of the churchwardens is to appoint the parishioners to pews on application, due regard being had to the condition and the wants (*supra*, p. 11) of the applicant, and if on the application, the ordinary fails to appoint him a sitting, there being some or any vacant, he may be compelled to do so by process in the Ecclesiastical Court. And that though the suggestion does not point to any particular seat being vacant, for unless they be all legally filled, they will be deemed vacant, and the Court will compel the ordinary to appoint.

Duty of churchwardens.

Compulsory process to allot seats.

Though the general right of the appointment to pews is with the ordinary, yet his right is often interfered with by the faculties, (but which emanate from himself) and prescriptions which suppose faculties. The consideration of which will form the next subject of our attention.

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TITLE BY FACULTY.

Faculty, what.

A faculty is an instrument granted under the name and seal of a bishop, and if it be subscribed by a deputy and not by the chief clerk of the faculties, and afterwards registered and enrolled, it is sufficient (*Com. Dig.* "*Courts,*" (N 5)). They are granted in the Consistory Court, which every bishop holds before his chancellor or commissary for all ecclesiastical causes within his diocese, which Court seems to have been erected after the time of Henry 1, on the ground of a charter by William 1, to the Bishop of Lincoln (*Com. Dig.* "*Courts,*" (N 6)).

Where granted.

Fuller v. *Lane*, 2 *Add. Eccl. Rep.* 427]. "The exercise of this duty is interfered with by faculties, and by prescriptions which faculties have occasioned. The appropriation has sometimes been to a man and his family so long as they continue the inhabitants of a certain house in a parish (*vide infra*, p. 46, *et seq.*); the more modern form is, so long as they continue inhabitants of the parish generally; the first is the more convenient mode, the objection which applies to faculties, is, that they often entitle parishioners to the exclusive occupation of pews, of which they are no

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longer in circumstances to be suitable occupants, whatever their ancestors might have been.

Varieties of.

A third sort of faculty seems to have been not unusual when the Church had been newly pewed, wholly or in part: to appropriate certain pews to certain messuages or farm-houses, the owners of which in right of them claiming a pew by prescription (the faculty itself being lost), and which claims are the proper origin of those prescriptive rights to particular pews recognized as such at common law. The claimants must shew annexation of the pews to the messuages time out of mind, and reparation by the tenants of such houses and messuages; but no faculty, either here or at common law, can be deemed good to entitle a non-parishioner to a seat in the body of the Church.

Origin of prescriptive rights.

Aisle and chancels.

As to an aisle or the chancel, it may belong to a non-parishioner (*vide infra*) for it is governed by different considerations, but a parishioner's right determines on his leaving the parish, and he cannot sell or assign, or let it as part of his property in the parish.

Pews annexed by prescription to messuages cannot be severed, the tenant for the time has a right to the pew, (*Ib.* 429).

Pews annexed to messuages by prescription.

Faculty, care to be used in granting.

Following the times, a strong case, indeed, should be made out to induce the ordinary to appoint any pew by faculty to a particular parishioner and his family," (*Ib.* 431. Sir *J. Nicholl*, *et vide Byerly and Windus*, 7 *Dowl. & Ry.* 564, *S. P.*).

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Faculty, rights annexed to.

Parnham v. *Templar*, 3 *Phil.* 523]. "An exclusive right can only be gained by a faculty, or length of time which presumes a faculty."

"A faculty, if once issued, is good against the ordinary himself," (3 *Add. Eccl. Rep.* 5). A dictum which must be most carefully received, unless the faculty is presumed to be one which was regularly obtained and granted, (*vide infra*).

Faculties, necessaries to.

Bull v. *Jones*, 2 *Hag. Eccl. Rep.* 424]. "Faculties are granted in the discretion of the ordinary, but it must be a sound discretion, having a due regard to times and circumstances, and rights and interests of those concerned, and if an unsound discretion be exercised, appeal will lie to a superior tribunal. In modern times, the utmost extent a faculty can go to; is to a man and his family, so long as they continue inhabitants of the parish, though in the old time they were sometimes annexed to a messuage (*Ib.* 424), but if it has been obtained by surprise, it is bad, and will be revoked," (*Ib.* 417).

Faculty obtained by surprise.

Faculty, when final.

Woollocombe v. *Ouldridge*, 3 *Add. Eccl. Rep.* 4]. "Ordinaries at this day are not to tie up their hands against such future arrangements in Churches within their jurisdiction, which may interfere with the increasing population. A faculty, if granted, would not be disturbed, unless it were clearly shewn to involve the plain violation of some private right, or gave rise to a considerable degree of general inconvenience; for faculties

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are matters so much in the discretion of the local Judge," (*Ib.*).

Harris v. *Drewe*, 2 *B. & Adol.* 164]. "A faculty was obtained for a man and his family, the successors, owners, and occupiers, of the house as appurtenant to which it was obtained. Annexed to the house was a summer-house, and stables adjoined the house, which summer-house and stables were, after the death of grantee, converted into a shop, and occupied by his widow; some time after, a room which was part of the old dwelling-house, was laid into this building, and the occupant used the pew."

Apportionment of a pew.

"The faculty gave the right to the several persons who should occupy the messuage to use the pew: the occupiers of the summer-house, which was part of the dwelling-house, are entitled under the faculty. If the occupants of the premises become too numerous for the convenient occupation of the pew, and they disagree, they must settle their differences among themselves. The churchwardens disturbing the occupiers of the summer-house are mere wrong doers," (Lord *Tenterden*, C. J., *ib.* 166).

"The right to enjoy the pew was annexed to the old dwelling-house altogether. The plaintiff who lives in a part of the house, has some right to enjoy the pew, and may maintain an action in respect of it," (*Littledale*, J., *Ib.* 167).

"The churchwardens had no right to interfere

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with a person deriving title through a faculty granted by the bishop. The case of dividing a house into two, must be considered in the same light as if an ancient house was occupied by two families; in that case, all the members of the two families would have right to use the pew," (*Parke*, J., *Ib.* 167).

Division of ancient house into two, effect on faculty.

"The right of sitting in an allotted space in a Church may be compared to a right of common of pasture which may be apportioned," (*Taunton*, J., *Ib.* 168).

Faculty annexed to a house.

Waller v. *Gunner and Dewry*, 1 *Cons. Rep.* 319, 321, Sir *W. Scott*]. "If a pew is rightly appurtenant to a house, it must pass with it, and individuals cannot, by contract between themselves, defeat the general right of the parishioners."

General right, contract to defeat.

"Whatever the claim of a person may be, it ceases on his leaving the parish," (*Ib.* 323).

Faculty for exchange of pews.

Stocks v. *Booth*, 1 *T. R.* 428]. "A faculty may be for exchanging seats in a Church, after the statement of the right of a particular house in the parish to a pew, the ordinary gave his consent to exchange it for another (but each was annexed to a house), for there can be no gift of a pew to a man without a faculty; a faculty to a man and his heirs is not good."

Faculty to a man and his heirs.

Title against

Wilkinson v. *Moss*, 2 *Lee*, 259, Sir *J. Lee*].

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"Citation why a faculty should not be granted for two seats of a pew in a Church. The defendant appeared, and said they were conveyed to him for value, and that he had been in quiet possession of them for twenty-five years. The plaintiff alleged conveyance to him eight years before, by the *cestui que use*, defendant being the trustee and holding in wrong. The Court decreed the seats to the defendant. On appeal, it was held, that Moss (the defendant) had a good possessory title." Grant of a faculty. Possessory title.

Partington v. *The Rector and Churchwardens of Barnes, Surrey*, 2 *Lee*, 345, Sir *J. Lee*]. "The considerations against the grant of a faculty are, first, whether the appropriation would be prejudicial to the Church, or the parishioners in general, in which case any parishioner might show cause against the grant, for he has an interest; secondly, whether the right of any particular person would be interfered with, in which case they would show cause against the grant: thirdly, whether the applicant is a proper person to have the grant made to them, in which case the churchwarden would show cause. Considerations against granting a faculty.

"Held: a person having an estate in the parish worth 100*l.* a year, and, besides, rents a house in the parish, though it was let for a part of the year, but who had always a servant to look after the freehold: resident in the parish; is a proper person, and one to whom a grant of a faculty should be made." (*Ib.* 355). Proper person to receive the grant of a faculty.

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Faculty, right to grant, how acquired.

In the observations upon the possessory right, adversion was made to the right which every parishioner hath to a seat in the parish Church, but which right, as has been shown, may be limited by the grant of a faculty. The books are barren of information as to the origin of the bishop's power to grant faculties for pews, though the right to grant faculties for all matters for which the see of Rome could license is specially reserved by the 25 Hen. 8, c. 21, to the archbishops. The cognizance by every bishop of matters ecclesiastical arising in his diocese is of a much older date, and before the time of legal memory as fixed by the statute, though at a later date than those customs which are said to be the origin of the common law. The cognizance of the bishop (*i. e.* his Consistory Court) was founded in the reign of Hen. 1, on the ground of a charter by Wm. 1, (*supra*, p. 30) to the Bishop of Lincoln.

Cognizance of bishop in ecclesiastical matters.

Grant of a faculty, what.

The grant of a faculty (for a pew) is not for a matter purely spiritual, or wholly of ecclesiastical right. It is rather the grant of a temporal right for the purposes of spiritual enjoyment, and one if rightly conferred and acted upon in the spirit of the grant, which not only devests the common law right of the grantee (*infra*, p. 62, *et seq.*), but overrides at the same time that of his fellow parishioners, and is indefeasible even by ecclesiastical power.

Right of

Whence or how the bishops acquired the

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right in question, it is difficult in this day to determine, or to give a sufficient reason for its exercise, unless it be that when the grades of society were more nearly approximating, either through the downfall of the feudal system, or the spread of commerce, or both, and the consequent diffusion of wealth—that conflicting claims were preferred to the same seats in the Church, creating disunion in the parish, and interrupting the orderly administration of the offices of the Church; and the bishop, in his character as the head of the diocese, first, perhaps as moderator, interposed between the parties, and which interposition afterwards, by repeated exercise, grew into the right of appointing the sittings of the parishioners in the parish Church. Conjecture is all which can be offered upon this matter, for the books are silent as to the origin of the bishop's power, whether it grew up by sufferance, or whether it is a claim founded in right, and annexed to his office from its first institution and the building of Churches, and to arrive at some conclusion upon the subject, a brief comment will be offered upon the possible sources whence the claim could be deduced.

disposition, how acquired.

The power claimed and exercised could not have been derived from a supposed notion of his being seised of the freehold of the Church, for that is in the parson (*Com. Dig.* "*Ec. Persons*," (C 9)) saving such rights as may be in the

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founder of the Church, and which could only apply to a small part of the edifice.

He cannot claim as suzerain, for the sovereign is the head of the Church, and to him the bishop does homage on his installation.

It could not be that the right was resident in the bishop before the Reformation, and so excepted in the saving clause of the statute of Henry 8, for Churches, it would appear from most indisputable authority (*Selden; supra*, p. 11, *in notis*), were not pewed until a time much later, and which might also be collected from the analogy of the Romish places of worship on the Continent, and which would show that the right is not coeval with the institution of the order, and would perhaps lead to the assumption that it is one exercised only in England.

Probable origin.

Therefore, it is suggested, the only probable way of at all accounting for the institution of such a power, a power which overrides the common law right, is to suppose, as above, that its growth was gradual, for though wealth was more diffused, yet in the sixteenth and seventeenth centuries the particular rights of individuals were still but ill understood, and the classes of society more broadly defined than they are in the present day. It might have been policy in those days to allot to the head families of parishes distinct seats, of which they bore the burden of repair, and perhaps enclosed, and that which is looked upon

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as rather a hardship in the present day, might, in the time of its first assumption, have been a benefit, as lightening the burden of the parish rates.

If the subject could be traced to its source, there is little doubt but it would be found to have originated from a spirit of exclusiveness, and which is somewhat borne out by the irregularity manifested in the distribution of the pews in many old parish Churches. The pews being built, and the repairs done by those who appropriated them, or acquired the right by appointment, might be, and doubtless in the then state of population, was, rather a good than an ill; and if this theory was followed out, it is apprehended the source whence the bishop derived his power would be shown.

If the right began in usurpation, it has been perpetuated by acquiescence, and is now too firmly fixed to be shaken, in those instances at least wherein a faculty or a prescriptive title can be shown (of which more hereafter), and if the right is adverse to the furtherance of spiritual instruction, as it is to that of the common law, it remains only with their Lordships not to exercise that right with which perhaps prescription has only invested them.

Dr. Watson, in his book on *Clergyman's Law*, (p. 717, *et seq.*), doubts whether an ordinary has power at all to grant a faculty; for he says, "if an ordinary cannot grant a seat to a person and his heirs, how can he make a grant to a house, persons not things being capable of

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grants?" So, if the ordinary has the power of appointing the seats, "the upper and the best seats will be appropriated, and those of like rank who come after will be only seated in remote places, the upper seats being now in the occupation of the servants." This would appear to be a fallacious mode of arguing against the right of appointment, which is in the ordinary.

When Dr. Watson speaks of persons, not things, being capable of grants, it would appear he was confounding them, and though the pews are granted as appurtenant to certain houses, it is in truth a grant of user to the persons inhabiting the particular house. If his argument was a good one, it would apply equally to easements (*a*) (strictly so termed) as well as to pews; for a right of way is not a grant to a particular field, but a something which the law presumes as necessary to its enjoyment. So in the case of a window-light, it is a right (not annexed to the person but to the thing, and yet it is for the use of the person) which has grown up by sufferance and is necessary to the commodious occupation of the house; so in the case of a pew, it is a place appointed wherein persons, the inhabitants of a certain messuage, have the right to resort for

(*a*) In *Mainwairing* v. *Giles* (*supra*, p. 18), Lord *Tenterden* said a pew right was an easement; with all deference to so great an authority, it is submitted, it is not an easement, but a right in the nature of an easement, for it has many though not all the incidents which characterize that peculiar class of property or rights (*vide supra*, p. 43).

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the purposes of public worship, and which is esteemed a necessary, if not from a proper sense of obligation towards the Deity, still by the enactment of many statutes. It cannot, therefore, be said, that the pew is a grant to a particular thing, but is rather an incident thereto, in order to its proper enjoyment; it passes with the house, if rightly appurtenant, not because the grant was to the house, but from the supposition that the succeeding inhabitants will have an equal need to attend the parish Church with that of the original grantee.

It is apprehended that it is only during user that the right attaches, and it is presumed the right acquired by faculty may be lost, as any other right may, by any act which shows an intention of abandonment (*supra*, p. 22). Shutting up a house (to which a pew was appurtenant) without any *bonâ fide* attempt to let it, for several years, and suffering it to fall into a ruinous state, would perhaps be considered such an abandonment as is here contemplated; but if a servant was left in it to take care of it, or there were continued endeavours to let it, these would be acts against the presumption of the intent to abandon. The possession of the servant would show an intention to return, and the non-letting would be attributable rather to misfortune than to will, and therefore would not act as a presumption against the owner. The pew, during the non-occupation of the house, would be free for the appointment of the or-

Abandonment, prescription of.

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dinary, subject to the rights which are in the owner; for a faculty is only the exclusive grant of a certain right during its exercise, and one which is inalienable, whether annexed to the person or to the thing.

As to the argument that the principal seats would fall into the occupation of the servants of the families, to the exclusion of others of equal rank, it is apprehended that that would never occur, for in those Churches wherein particular families have an exclusive right for themselves, they usually have also for their servants; and if the other servants were the only residents left in the tenements, they would occupy the seats appropriated for them, and not those of their masters, unless by the express appointment of the churchwardens; for the master has no power to delegate his right, and he therefore cannot appoint his servants, or any other persons to his pew during his absence. As to houses of equal or superior degree being built in the parish (*b*), that would be only likely to occur in the neighbourhood of large towns, and in them new Churches are usually built to meet the increased demand for church-room. Besides, in so arguing, Doctor

(*b*) The building mania is almost exclusively confined to the neighbourhood of large towns, or to the immediate neighbourhood of railway stations, in which case a new Church is usually included in the plans; but, in remote parishes, if a large house is built, accommodation can generally be afforded in the Church, for it is not in the agricultural parishes that Church-room is so great a desideratum, as to create the distress which Dr. Watson seems to fear.

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Watson forgets the possessory title which a parishioner acquires by the appointment of the ordinary, and which would be equally a bar with the faculty, for thereby the parishioner gains a title which is only to be ousted upon very urgent necessity (*supra*, p. 20), and such necessity would not, it is conceived, be presumed in favour of a new inhabitant of a newly-built house, though he might be of greater rank than the parishioner who would thereby be unseated.

Pew right, definition of.

The right gained by the grant of a faculty to a pew, is in the nature of an easement, though it does not come within the exact definition of the term, it being much narrower in some respects, and larger in others. An easement may be annexed to land, as the right of drainage; a pew cannot, but where annexed to a house, the similarity is most perfect, for in that case if the house be pulled down, and an intention be showed of abandonment, the right is in both cases gone; but then an easement must always be in respect of some particular property, and annexed to it, in order to its full enjoyment, and may extend over several parishes, as in the case of a watercourse, right of way, &c., &c., whereas the right conferred by a faculty may move with the person so long as he performs the particular condition, as residence; and it can in no case be extended beyond the sphere of the individual parish or apply to any other building than the Church. It confers no absolute, though it does

Difference from an easement.

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a qualified right of property, for it cannot be severed from a messuage if annexed thereto, or if to a person, "so long as he continue an inhabitant of the parish;" he cannot displace the right it confers on him, for the purpose of annexation to another, and we have seen (*supra*, p. 34), that where two possessed faculties, and they wished to exchange their places, a faculty was necessary to enable them to do so.

Qualities in common.

The property a faculty confers in common with that of an easement, is of a very qualified nature, being the mere right of user, and in both cases in opposition to the common law right.

Difference between a prescription for a pew right and that of an easement.

In an easement, twenty years of undisturbed user confers the positive right, but it is not so in the case of a pew, which must be by an actual grant, or such a prescription to which no commencement can be shown, though it need not be the absolute one of high legal memory, and to the prescription, repairs is a necessary incident as an evidence of the right.

An easement passes with the dominant tenement, but a pew-right must be construed by the strictness of the limitation contained in the faculty; if claimed by prescription, then it passes with the messuage in the right of which it is held, and from which it cannot be severed; but in no case can the owner let his right to another, apart from the tenement, whether it be claimed by prescription or by (*supra*, p. 31), virtue of a faculty, for the grant supposes his necessity, and when that necessity ceases, the grant is void. So, a man,

Power to sever right from messuage.

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whether he holds by prescription, or by grant cannot sever his right if it be annexed to a messuage; neither can he let his right at a rent, for such letting is wholly unknown to law, and is, therefore, illegal (*supra*, p. 17).

Letting pews at a rent.

Some late acts of Parliament have conferred the power of letting the pews in Churches, but that is only in the cases of new Churches, built in accordance with the directions of the various statutes, (*infra*).

Pew letting by Act of Parliament.

From the cases quoted, it has been shown that the power of granting faculties for pews is in the bishop, and the administration of which it is said is to be exercised with a careful discretion, due regard being had to the times, (*supra*, p. 31). The Ecclesiastical Courts have assumed to themselves, perhaps rightly, the power of determining whether a faculty has been properly obtained, and if so, whether a proper discretion has been used in making the grant, as whether it interferes "with a private right," or "gives rise to considerable general inconvenience."

Faculty, grant of, in whom.

Ecclesiastical Court, discretionary power.

A faculty, when produced in evidence, must be proved as any other written document would be: by the production of the faculty itself. Though secondary evidence may be given of it, if it be not forthcoming, as if it is lost or destroyed; by the transcription of it from the records of the bishop's Court, in the diocese in which it was obtained, that is, by the production of an examined copy (1 *Phill. on Ev.* 432, *9th ed.*); and it is also absolutely necessary to show, that the

Faculty, how proved

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repairs have been done by the party holding, or those in whose right he holds. In the present day the most rigid proof will be required, for the Courts have set their faces against them as curtailing the common law right, and, therefore, it is apprehended, the terms of the faculty would be subjected to the strictest scrutiny, and require the most satisfactory proof.

Grant to a man and his family construction.

When the faculty has been "*to a man and his family so long as they continue the inhabitants of a certain house in the parish.*" In discussing the words of the grant, a strict attention must be given to the nature of the instrument, and the right which is by it intended to be conveyed. If these words were used in respect of a freehold estate of inheritance, it would confer on the grantee an estate for life, for the general rule of law is, that the word "heirs" is necessary to create an estate of inheritance, and it has been shown that a grant by faculty to a man and his heirs (*Waller* v. *Gunner and Dewry*, 1 *Cons. Rep.* 321) is void; so it would seem with or without the word "heirs" the grant could not descend, therefore it cannot mean more than the annexation of a species of easement to a particular house in the parish which a man holds for him and his family, so long as he continues the occupant.

The word "family" it is apprehended is not used in its general sense, but in a more limited one, meaning not the lineal descendants of the grantee: but those whoever they may be, who

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are dwelling with him in the house; the limitation being intended to show the description of persons to be introduced, for the necessity of the man is the inducement for the grant (as the cession of the common right is the consideration) (*infra*, p. 65, *et seq.*), and the necessity of the grant extends to all those dwelling in the house equally with himself, for it is as equally proper for them as for him to attend the public ministrations of religion; in other words, it is a grant to a man to occupy a particular pew in company with other persons who may be resident in his house as part of his family, the grant is to them equally with himself, and he would have no power to exclude any member of his family so long as the individual continued a member, inhabiting with him the particular house to which the faculty is annexed. But if the grantee whilst on the road to, or even at the door of the Church, inhibited one of his family from sitting in the pew, by declaring him to be no longer *a member* of his family, within the meaning of the grant, the right of such person would immediately cease, for he is only a parishioner in the right of the grantee, and if the grantee declares that right to be at an end, there could be no consideration for the grant (*c*), for though the grant is to "a man and

Inducement of the grant of a faculty.

Power of grantee to exclude a member of his family from the pew.

(*c*) A faculty is a writing, and though the words be not "*dedi et concessi*," it is in effect the grant of a right in and upon the freehold of another, and therefore is it contended there must be a consideration. It has been held, that a grant may be made

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family," &c., it is so only so long as they continue members of his family, and whilst they do

without consideration; and on the other hand it is said, "A deed also, or other grant made without any consideration, is as it were of no effect, for it is construed to enure or to be effectual only to the use of the grantor himself," (*Perk.* 533).

There is of course a difference between considerations. In some cases, relationship is held to be a sufficient consideration; while in others, a valuable consideration is necessary to uphold it, and which may be either an actual act done, as payment of money or forbearance, as abstaining from suit, on repairs being done, or forbearing the exercise of a right, as *to sit in a particular place.*

In a faculty, the consideration does not appear upon the face of the writing, and if one could not be implied it would, it is apprehended, be bad; but where a consideration can be implied, the law will raise one, rather than vacate the grant. It is said, "no inference can be raised beyond the words of a grant" (*Com. Dig. Grant* (G 4)). In the case of the grant of a faculty, the inference, or rather the inducement, is the necessity and the residence of the applicant; and the abstaining from using the common law right would be a valuable consideration, for it is a right inherent in every parishioner, and antagonist to the exclusive right acquired by the faculty, and therefore is it, there must be some consideration to maintain it; if not as between the grantor and grantee, at all events between the grantee and those whose rights are infringed, and which consideration must be an equivalent, and it must have a lawful origin. In *Tomlin's Law Dictionary*, title "*Deeds*," (after speaking of bad considerations, it is laid down, "any of such will vacate the deed, and subject such persons as put the same in use to forfeiture." Now a faculty, if not a deed, is in the nature of a deed, being an instrument in writing and under seal, and is registered in the Court wherein it is granted, and therefore it must be upon a consideration, express or implied.

Mr. Justice *Blackstone* (2 *Com.* 440), makes a distinction between gifts and grants, and says they are "to be thus distinguished from each other, that gifts are always gratuitous, grants

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so, it is conceived they have a right, (though derived through him) as extensive as his own, to sit in the particular pew set forth in the faculty, and it is apprehended if the grantee hindered them

are upon some consideration or equivalent." It is impossible that the faculty can be considered in the nature of a gift by the bishop, though it proceeds from and is founded on the right incidental to his dignity, and which he may or may not exercise: but for its exercise, there must, in the first place, be a sufficient inducement, and yet though all the necessaries to the inducement exist, such as residence, &c., yet the bishop may refuse to exercise his power; so it must be on his part a voluntary act, though subject to a certain restraint.

Again, a faculty cannot be said to be a gift, because it is a right to be exercised upon the freehold of another, and which at the first view may appear to be an anomaly, but then it is a right to be exercised in accordance with custom, and can be granted to those, and those only, who can claim the customary right (*infra*, p. 66). The bishop or ordinary claims his right to both the general and exclusive appointment by prescription (*supra*, p. 39), or it may be by custom; and it being a rule of law that a custom must not be unreasonable, it follows that the exercise of the custom must be exerted in a reasonable manner. The appointment by the bishop of an individual to sit in a particular place in a Church is not unreasonable, he having the right to sit somewhere; but at the same time, it is opposed to the general right of the parishioners, for it is the appointment of a particular person to an exclusive seat, to enure so long as the conditions of the faculty are fulfilled: it cannot be a mere license (*vide infra*), because it is a direction to do a positive act and to exercise an exclusive right (during user). A faculty, for the reasons above stated, must be a grant, and a grant upon condition.

This note has been considered necessary, because it is stated, without qualification, that a grant must be upon consideration, whereas there are a few cases in which a grant would be held good at law, though there was no consideration.

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in the enjoyment of that right (they not being discarded from his family as above), a suit for perturbation would lie, or case at common law.

Faculty, construction of, in regard to lodgers.

Having so considered the case with regard to the individuals of a man's immediate family, we will look at its operation in regard to lodgers. In *Woollocomb* v. *Ouldridge* (p. 13), it was held by the Court to be immaterial whether a person paid the rates and rent in one sum, or whether in several sums, if in one sum; the rates were included, and such person was held to be a parishioner. In the case cited, the person occupied the whole house, which for the purpose of a sitting at Church, it is apprehended, would make no difference, and lodgers occupying a part at a rent would come within the definition, for though they pay a sum in gross for a particular part of the house, yet by the aid of that sum the grantee is enabled to pay his contribution towards the repairs of the Church, which is levied in a rate, and is incidental to his being a parishioner, and which he is liable to pay by the custom of England: the lodger's spiritual wants would be equal with that of the grantee: and so the necessity; therefore: whilst he continues to occupy a part of the house, he would be, it is conceived, within the meaning of the word "family," and in the contemplation of the ordinary at the time of the grant; for it is the same as though the house was split into several tenements, for a faculty may be apportioned (*supra*, p. 33), though the grantee could, on the spot, under the

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circumstances above, inhibit one of his immediate family from sitting in the pew, yet the same power would not extend to his lodgers, for they would continue members until their holdings were duly, and according to law, determined; and during that time they would in right of his right be entitled to sit in the faculty pew, for the right is not to the man as personal property, but for the use of the inhabitants of the house, so long as he continues a parishioner, and it might be the knowledge that the landlord possessed such a right as the faculty confers, was the inducement for the lodgers to become his tenants.

Family, construction.

The word "family" would not of course be held to extend to the servants: for it is the policy of the law, and justly, to regard the distinctions of classes into which society is divided, and it is presumed the words of a faculty would receive such a construction as would be the reasonable intendment, regard being had to the particular rules of law which bear upon the case; therefore it is conceived that the servants, though inhabiting the same house, are not included within the term "family," which, it is admitted, is a word of large signification, yet to put such a construction upon the term as to include the servants, would be breaking that rule, which says, "all persons have a right to be seated, *due regard being had to their condition.*" To place the master in the same pew with his servant would

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be an utter disregard of all rules of decorum, to say the least, and in making the grant the ordinary could never have intended to commit an outrage upon all the proprieties and conventions of life, and therefore is it that the word "family" was not intended to include the servants.

Grant of faculty, what and how lost.

The grant in question is a grant for life, or so long as the condition is fulfilled. If the grantee let the house, reserving to himself no part or power other than that which is usually in the lessor, his right would be gone, but if he continued to inhabit a single room the right would still enure to him, but if he once parted with the possession in such a manner as to show abandonment, the right would be lost for ever, for the condition was residence in a particular house, nor would it be revived by his re-occupation, for a less rigid mode of construction could not be assumed in the case of a faculty than is the rule when the realty or personalty is concerned; it is a grant upon condition, and if the grant were, as in the case of a realty, "to a man and his heirs, so long as they continue the tenants of a certain manor, when they cease to be tenants, the grant is defeated." So a grant of a dignity to A. and his heirs, so long as they continued lords of a certain manor on their quitting the seigniory of the manor, the dignity is at an end, (1 *Blac. Com.* 109); if, then, the right would lapse in the case of a conditional fee by the non-performance of the condition, how much greater

Faculty grant upon condition.

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is the reason that it should, in the case in discussion; if the grant be viewed, as in the nature of a personalty, it would be an absolute gift to a man, but the right in question cannot be a personalty, because the grantee can exercise no control over it, and it must be annexed to a house.

Grant to a man and his family, &c.

When the grant is "to a man *and his family, so long as they continue inhabitants of the parish generally*," (which is said to be the more modern form). In this case the grant is less assimilated to an easement than in the former case, though the same arguments may, with equal force, be applied, but with this difference, that in this instance the grant is motive, and the right would continue, though the grantee removed to another house situate in the same parish, and the word "family" would, it is apprehended, admit of the same construction as was offered in the former case, and would be a grant to a man and those resident with him as his family.

Faculty, when motive.

Construction.

On the grantee's moving to another house in the same parish, the right which was before attached to the messuage moves with him, and is during his residence appurtenant to his new abode; and those members of his family *only* who moved with him would be partakers of the benefit of his grant; and that, though part of his family remained in the former messuage, for they only acquired a right through him, and not an independent right; but yet the right ac-

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quired, it is conceived, would be sufficient to maintain (the conditions being alive and fulfilled) an action on the case, or a suit for perturbation (*supra*, p. 47).

If any other construction was admitted, the very intendment of the grant would be defeated, for it is meant as a convenience to the grantee, and through him to his family, or those resident in the house with him, on his or their attendance at a place of public worship; but if all who had resided with him as members of his family acquired an independent right equal to his, his would soon be rendered worthless, for by possibility his faculty pew would become the most crowded spot in the Church.

It is doubtful whether this construction would apply to the lodgers who might be resident in the former messuage, for perhaps they become part of the grantee's family, for the very purpose of being enabled to attend the Church in the faculty pew, and if not the only, it might have been the great inducement, for their becoming the grantee's tenants; and if, as it would seem, the right continued in the grantee, it is presumed the lodgers' right would endure at all events until the end of such time as the law would imply to be a proper notice for their peculiar tenancy. It might be, the grantee leaves his house in the middle of a quarter, turning over his house and lodgers to some member of his family, and to whom no pew

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right attaches: if the pew by such means becomes crowded, the grantee could have no right to complain, for the crowding is the consequence of his own act, and the law would rather suffer him to be inconvenienced, than he should do a wrong to his tenants. If he left the parish, the right would be disrupted; and no one through his grant could possess the faculty pew, the lodgers' right of user would of course cease with his, and their remedy, if any would then have to be sought through other means.

Grantee ceasing to be an inhabitant.

The right, on the grantee's leaving the parish, would revert to the ordinary, to be by him used for the general advantage, or by possibility it might be again applied in the same exclusive form. It must revert to the ordinary, for the condition is not fulfilled; it is a continuing condition, and runs with the right, therefore that rule of law would not apply, "that a condition once satisfied is gone," for in this case the condition being co-existent with the right; can only be satisfied by the completion of it. The words, it is apprehended, cannot receive a larger signification than that suggested, for the intention of the grant must be taken into consideration, as well as the words of it, and the intention is clearly that the grantee, and those resident in his house, shall be enabled to attend the solemnization of public worship in a decent and reputable manner.

Condition of faculty.

Proof of residence in the last case in the parish,

Proof, ne-

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cessary to support.

and in the former in the particular house, at the time of the disturbance, would be sufficient to support the faculty, but which presumption would be liable to be rebutted by showing non-residence in the house or the parish, as it might be, accompanied by such acts as would show an intention of abandonment (*vide supra*, p. 22), and no lapse of years would be sufficient to restore the right, for the commencement of the title would be shown by its breach, and by consequence its abandonment, and by showing its commencement an after prescription would be barred.

Proof, how rebutted.

Faculty, an estate for life on condition.

The above limitation, it is contended, can be merely an estate for life on condition, and which condition will require an exact fulfilment.

We have now to treat of a faculty which admits of a larger signification, and which passes with the messuage; faculties have been obtained for a man and his family, the successors, owners and occupiers of a certain house (*supra*, p. 33); in this case it was held that the right not only descended to the occupiers of the house, but was also capable of a division, and on the house being converted into two, it was held the right should be apportioned, the proof required was the production of the faculty, and that the then two houses formerly constituted the one, as appurtenant to which the faculty was obtained.

Faculty appurtenant to a messuage.

When the faculty annexed to houses is one of this nature, (*i. e.*) of the largest extent, the rights of the persons pointed out, exist so long

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as the house and the pew exist, and the right cannot be lost by the mere abandonment of the tenant, and his seating himself in another part of the Church; but as far as the tenant's right is concerned, it would, it is conceived, be an abandonment, and during his possession of the messuage, the right would be gone, to be revived again upon occupation by another tenant, and that though the ordinary in the interim had appointed another parishioner to the pew; for by the faculty suggested, the pew is inseparably annexed to the house as a kind of easement, but it is not liable to be lost as an easement would be by non-user as against the future occupiers and possessors of the house.

Non user of tenant.

If instead of the tenant, it was the proprietor of the house who had done such acts as showed an intention of abandonment, and the ordinary took advantage of such lapse, and appointed, before he resumed his right, in such case, a severance would be effected, and the exclusive right to the pew would be gone for ever; for by his conduc the shows dissent, and thereby repudiates the grant, showing that he prefers his common law right (which is made void by the grant) (*infra*, p. 65) to the exclusive one conferred by the faculty. It is very doubtful whether he could resume the right conferred by the faculty when he had once repudiated it, and that; though the ordinary did not take advantage, for it would immediately revert, and being a right as shown

Faculty, abandonment of by proprietor.

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conferred in violence to the common law right; the law would assume the most severe construction, because the act of abandonment could not be accidental, and must, therefore, have been wilful and voluntary.

Where a house has been divided, and two distinct families inhabit it, or it becomes the freehold of two distinct individuals, the same rules, it is conceived, would apply, and the right might enure as to one part of the ancient fabric, and it be lost as to the other. So if several families occupy the same pew, but in virtue of separate faculties, though they be tenants in common of the pew, yet during their particular occupancy, the occupancy of one would not be the occupancy of all; for though they be tenants in common of a particular pew, yet the property in their respective sittings is several and not joint, and therefore the holding of one would not be construed to be the holding of them all, and if one did such an act as showed an intention of abandoning the exclusive right, and resuming that of the common law, he could do so, and to such party the right would be lost.

Tenancy in common.

Joint tenancy.

If a pew was granted to two or more in joint tenancy, if one abandoned his right, and the other or others continued to occupy, such occupancy would not, it is apprehended, enure to keep alive the right of his co-tenant, for though they are said to be seised "*per my et per tout*," yet such abandonment would be construed as a severance of the estate as effectually, as though

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it was by deed for the purpose of barring survivorship; for by forfeiture, a joint tenancy can be severed as well as by alienation; but in the case of a pew right, it has been shown that it cannot be aliened.

Faculty appurtenant, how lost.

It is apprehended, that the same rule would also apply to a tenancy in common.

Tenancy in common.

Faculties were not only granted for pews, but are also necessary when any extensive alterations is contemplated in a Church, as the erection of a gallery, or new pewing the Church, which will form the next heading of our subject.

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FACULTY FOR ALTERATIONS.

Parnham v. *Templar*, 3 *Phil.* 527]. "The alteration of a pew, where no private rights are infringed, does not require a faculty; but in important alterations where parishioners are to be burdened by additional rates, a faculty is highly necessary, and it is quite proper and should be applied for," (*Ib.* 528).

Faculty, when required for alterations.

Allotment of pew, on payment of rent.

"A faculty was obtained for new pewing Church on completement, the pews were allotted by the churchwardens, and a rent was fixed to be paid; held such apportionment could not create a right to the pew as against the convenience of the parish, (*Ib.* 532, Sir *J. Nicholl*).

Faculty for a term.

"An alteration, with the concurrence of the churchwarden, ordered by the curate, if it will not disfigure the Church, may be done without a faculty," (*Ib.* 528).

Blake v. *Usborne*, 3 *Hagg. Ecc. Rep.* 732]. A faculty was obtained for the erection of a gallery, and to encourage contributions, the pews were allotted for ninety-nine years, at the end of which time, the rights of the ordinary and the parishioners were to revive. "In this case, it was held no prescription could be

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claimed, for the origin of the title, of the conditions and the terms appear. The possessor of the faculty pew, on the expiration of the faculty, would have such a possessory title as only extreme necessity would oust (*Ib.* 734); and in such case, an auctioneer promising, by advertisement to give possession of such pew to the purchaser of a house in which possessor lived, and which belonged to him, is promising more than he had power to perform, and a permission by the churchwarden to hold the pew until the purchaser should be ready to sit there, though by a parishioner, and for a parishioner who was seated in another part of the Church, is illegal and improper. It is an improper exercise of the churchwarden's discretion, and the possession of the persons under such circumstances, gains them no right even against a disturber," (*Ib.* 735).

Promise by auctioneer to give possession of a pew.

Exercise of churchwarden's power, when bad.

Groves and Wright v. *The Rector and Parish of Hornsey*, 1 *Const. Rep.* 188, Sir *Wm. Scott*]. A faculty to erect a gallery was applied for on the ground of the want of pew room, and was opposed, on the ground that the Church was old and would not bear the additional strain, and that the erection of the gallery would obstruct the light.

Faculty for erection of gallery.

The first objection would be good, if supported, (*Ib.* 179); the last would be bad if it be shown the Church is *sufficiently lighted*, or that it could receive such additional light by an alteration in the form of glazing the windows, (*Ib.* 196).

Objections to faculty, when valid.

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Attention of the Court to the wishes of the majority.

"The majority may incline to unnecessary expense, against which the Court should protect the minority; it may refuse the whole parish joined together, or grant the prayer of one against the rest. It will pay great attention to the majority, though it will not be bound by it, (*Ib.* 189). The first point to look at, is, whether disapprobation of the parish can be ascertained by the resolutions of the vestry. If it be proved that the order of vestry authorized an application for a faculty, and was confirmed at a subsequent vestry, not being annulled at an intermediate one, such a statement of facts must be taken as the sense of the majority, unless it can be shewn that such majority was unduly obtained, (*Ib.* 191).

Notice of vestry.

"If it be shown on the plea of no notice that due notice was given, and persons do not choose to attend the vestry, they are not, therefore, to plead ignorance, though the notice was general and for parochial purposes only, (*Ib.* 191).

Majority obtained by a canvass.

"If the majority in the vestry was obtained by canvass, it is no objection, though canvasser be one of the majority, unless the canvass was corrupt, (*Ib.* 192).

Reason for grant of faculty.

"If it be shown that the Church is too small, and that parishioners cannot be accommodated in consequence of the building of new houses, in such case it is reasonable to apply for a faculty, (*Ib.* 194).

Appropriation of pews.

"Objection that churchwardens might put different persons into the same pew not appropriated by faculty. They do not say they are not

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by custom or other title which the Court would respect, unless disputed in a regular and proper manner, for they may be appropriated by prescription, or by the allotment of the churchwardens.

Prescriptive right.

"A prescriptive right cannot be altered by any authority, (*Ib.* 195).

Possessory right.

"A possessory title cannot by churchwardens only, though it may be by the ordinary, (*Ib.* 195).

Preservation of the symmetry of the Church.

"The Court would be careful to preserve the symmetry and proportions of the Church (*Ib.* 197).

Costs of opposing grant of faculty to erect gallery.

"The costs are in the discretion of the Court, and are not matters of strict law, but where persons factiously oppose, they will be condemned in costs, but if be shown that the opposition arose from a difference of opinion in the parish, although all the apparent opposers are of the same family, costs will not be decreed," (*Ib.* 197; *vide supra*, p. 61, *et sequitur*).

Factious opposition by vicar.

Tattersal v. *Knight*, 1 *Phill.* 238]. "Where a vicar objects to a faculty for the erection of a gallery which would not disfigure the Church, and is much wanted for the accommodation of the parishioners, and his objections are factious, he will be condemned in costs."

Faculty to pull down a Church.

Stevens and Hollah v. *the Rector of St. Martin's, Ongar, and Others*, 2 *Add.* 255]. A faculty was obtained for pulling down a Church under the following circumstances: St. Martin's,

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Ongar, was united to St. Clement's, Eastcheap, by the 22nd of Charles 2, c. 11, s. 66, which was to be the parish Church for the united parishes, and it was directed in the statute, that the site of the Church of St. Mary, Ongar, and the churchyard, should be enclosed in a wall, and used as a burying place for the two united parishes, and for no other purpose whatever; contrary to which provision a lease of a part was granted for the purpose of erecting a French Protestant Church, which was built partly upon the old foundation of the Church, and which was used as such for a long period of time; in A. D., 1823, it was delivered up to the churchwardens in a state of great dilapidation, and application was made for a faculty to pull it down. "The Court are unwilling to sanction the demolition of any building which has something at least of the character of a national Church," Sir *J. Robinson.* It was requested that it might stand over, when, if no objection was offered, the faculty would be granted; no objection was offered, and the faculty was granted.

Faculties for the erection of a gallery and for newly pewing a Church.

Faculties for pews has been commented on at some length in a former part of this treatise (*supra*, p. 36, *et seq.*), but faculties for the erection of galleries and for a new arrangement in the pewing of Churches, must necessarily broadly differ in their distinctive features from those already

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discussed; the one being an appropriation to an individual or individuals, an appropriation as has been shown, which is clearly in disruption of the common law right, inherent in every parishioner; and yet in one sense, a grant which may be made justly and be concurrent therewith, for it is only an appointment in order to its more exclusive enjoyment.

Faculty concurrent with common law right.

By the special appointment, (*i. e.*) the grant of a faculty) it is contended, that the common law right which the grantee had in common with his fellow parishioners is extinguished; at least, for so long as he holds the exclusive right, or rather it may be said merge into the grant.

Consideration for the grant of a faculty.

If this view be a correct one, the churchwardens could equally prevent the grantee from occupying any other seat in the parish Church: as the grantee could hinder them or any other parishioner from occupying his seat: and thereby ousting him from his right and the enjoyment incidental to his grant.

The grant must have been made upon consideration, or it would be void. It confers an exclusive right, so some thing must have been given for it as a consideration, in order to its legal enjoyment; and, therefore, it is contended, it takes away the common law right, that being the only legal consideration which could be offered in exchange, and which could not be coexistent with the grant.

It would have been an absurdity to suppose

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that the grantee could fill two different seats at the same time, and in virtue of two different rights springing from the same origin; for it may be said, that it is the necessity for the grantee which is the inducement of the grant, so it is the necessity of the parishioner which confers upon him the common law right to a seat in the Church. Though none of the cases go to this length, yet, it is impossible reasonably to conceive it can be otherwise, and which will be proved by a strict examination of the principles which govern these rights.

Consideration for the grant of a faculty, what.

In these considerations it should always be remembered why the grant is made, and what is the inducement for it. It will, it is conceived, be admitted, that the common law axiom of consideration would apply to the instrument in question; if so, it will be also admitted that the consideration must be a legal one, and in examining the various *possible* considerations, it will be shown the only legal consideration which can be offered in exchange for the exclusive right, is the cession of that right with which the common law clothes every parishioner; and it is contended, no other legal consideration can be urged, for if it were shown that money was paid for it, that would of itself be a voidance.

Payment.

In the case of *The Bishop of Ely* v. *Gibbons and Goody*, (4 *Hag. Eccl. Rep.* 173), which was a claim by a vicar to have his opinion allowed against granting a faculty to bury in the chancel

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of a Church, Sir *J. Nicholl*, in giving judgment, said, "the opinion of the vicar against such a grant would have due weight with the ordinary, but it must have a better cause than his mere will; still more so if his consent is to be made a matter of *barter and purchase*."

The case of a faculty for exclusive right to bury in the chancel is much analogous to that of pews, and it has been shown that payment in such cases can never be the consideration for a faculty (*supra*, p. 19), for it is a thing which the Ecclesiastical Courts, who are the proper Judges in these matters, would never tolerate.

Repairs.

It cannot be urged, that the repairs which may or may not be necessary during the occupation of the pew, would be a sufficient consideration; for legally they could be no consideration at all, and even if they were peremptory, it is doubtful how far they would be allowed to extend in the nature of a consideration, but we have seen they are a mere evidence of the right (*vide infra*).

If they were peremptory, they would not come within any of Mr. Justice *Blackstone's* definitions of a consideration, (1 *Bl. Com.* 444, *et seq.*). The grant of the faculty might possibly be a sufficient consideration for the repairs being done, but a vague promise to do something which might or might not be done (for the pew, during the occupation, might not require any repairs), could never be construed as a consideration for

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the grant, for on an attempt to enforce the grantee to do them, he could vacate the right which the faculty conferred, and his refusal to repair would be construed either as an abandonment, or that he had never entered upon the pew in the right of his faculty, but by the mere appointment of the ordinary in virtue of his common law right; but if repairs could be construed to be a consideration, the repairs could be enforced; but they have ever and properly been held only as a mere evidence of the right.

Non-user of common law right.

The only implication, in the absence of an express definition of the particular consideration to be given, would arise in non-user of the right with which the common law had invested the grantee, and which would come exactly within the definition as laid down in a note by Mr. Justice *Coleridge*, in his edition of *Blackstone* (1 *Bl.* 446), in speaking of the consideration which arises by implication from a contract executed, he says, "an implied promise is that which the law raises from previous circumstances passing between the parties, and therefore, the foundation must be something which has a legal value."—A right forborne to be exercised is a thing of legal value.

Residence.

Residence could not be the consideration, for that must have existed before the application for the grant. And that which was in existence before and continues afterwards unchanged, could never directly or indirectly be construed

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as a consideration; for it was necessary, before even application could be made for the faculty, and is afterwards made a condition. Residence is necessary, in order to give a person a right to sit in the Church; therefore if it be necessary (and it is) to give such a right during the existence of the right, it must continue, or the right would be gone. Then it is presumed, that as residence and the common right must be co-existent, it cannot be extended, so as to become the consideration for an exclusive grant, especially where another consideration can be shown.

The common law right is inconsistent with the enjoyment of a faculty, because the same person cannot occupy two pews at the same time, one in his right as the grantee of a faculty, and one in right of the common law right as a parishioner. They are besides two opposing rights, one being a general, the other an exclusive right, and which, if allowed, would have the effect of depopulating the parish Church, and be a manifest grievance to the parishioners generally: one or other of the sittings must be unoccupied, because the grantee or occupant could not appoint another person to sit in either of his pews; the right of appointment to both being in the ordinary.

The common law right inconsistent with the grant of a faculty.

By the exercise of his common law right, if it were not ceded, he could compel the ordinary to seat him (*supra*, p. 17), and that, it is presumed,

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though he held a faculty pew. If the common right continued in existence, the application would be in respect of that right, and the faculty would be a matter extraneous, and the Court would not allow the possession of it to enter into the consideration of the question, or they would be travelling out of the record. The application would be that of a mere parishioner, and to which character the law has annexed a need of attending the Church, and has conferred a right of being seated according to the degree of the parishioner and his wants; and those rights which the law annexes to a person, all Courts are bound to observe.

Therefore, is it contended, that the common right must be ceded, but which cession could not be but upon consideration, and if it were possible to imply a consideration, the Court would do so rather than vacate a contract in which it was not expressly set out, especially if that contract was executed.

Repairs.

Repairs cannot be the consideration for a faculty. They are mere evidence.

Residence.

Residence must have existed before the application for a faculty and exists in the same state afterwards, and could not therefore be the consideration.

Common law right.

The common right would be inconsistent with a faculty, and if it be inconsistent, it cannot exist therewith; therefore, the cession of the common right must be the consideration for a faculty,

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because it is a right, and he who has the right cannot be deprived of it without consideration.

Considerations on granting a faculty for alterations or augmentation.

Such are the considerations attendant upon the mere grant of a right to a pew, but far different must be those which press upon the mind of the ordinary, when the application is for a faculty to authorize an extensive change in the interior arrangement of the Church; for the faculty is not for a mere exclusive appropriation of a small part of it, but for carrying out an object which might not only so interfere with the common right, which is vested in the parishioners, to the extent of rendering it useless; or at all events, comparatively so, besides compelling them as a body to pay largely for privileges which many may not desire, and perhaps eventually leading the parish into expenses not contemplated in the outset. Therefore is it necessary, that a most vigilant and jealous discrimination should be used by the ordinary before he exercises his discretion in granting a faculty; on the one hand, to avoid an immense and perhaps unnecessary expense; on the other, to have a proper regard for the general right, which every parishioner has, to be conveniently seated.

Right of parishioners.

It may be by the building of new houses in the parish, or from other causes which have induced an increase of population, that the body of the original parish Church has become totally inadequate to the wants of the parish, and it is reasonable, that as all have an equal right to be

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to be seated.

seated in the parish Church (unless where disposed of by faculties and prescriptions), it follows, if the accommodation which it affords, can be supplied by a new arrangement of the pews or by the construction of a new gallery, it should be done.

Right of parishioner to seat, what.

The right which every parishioner has in his seat, may be considered as in the nature of a resulting use (upon condition), which vests immediately upon its fulfilment, (*i. e.*) on his becomirg a parishioner, creating a species of tenancy in common which shall endure so long as the condition is fulfilled, but which is immediately devested on its non-performance and liable to be so upon non-user; and yet, as in the consideration of an easement (*supra*, p. 43), the likeness was not exact, so here there is also a dissimilarity, for there may have been no previous right and no intermediate estate; nor can it be brought exactly under the definition of a springing use, for in that case there must be a person seised to uses at the time of the contingency happening; whereas in the case of a pew the use or right vest immediately, on a person becoming a parishioner, and that though there was no previous estate to support it; so it is difficult to determine what particular property a pew is, it is neither real or personal estate, yet it partakes of the nature of both; so it is neither an easement or an use, and yet it is in the likeness of both.

Faculty for alterations.

The considerations which should guide the

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ordinary in his exercise of this right, are broadly laid down by the late Lord *Stowell*, in his judgment in *Groves and Wright* v. *The Rector and Parishioners of Hornsey* (*supra*, p. 57). He there says, that the wants of the parishioners generally are to be considered, and which wants are to be collected from the conduct of the parishioners in the vestry, wherein the matter is introduced, but in the consideration of which the Court will exercise a due discretion; for by possibility the majority of the parish may incline to an unnecessary expense, but which he qualifies by saying, the Court would pay particular attention to the majority. Still the vested rights of every person concerned are to be consulted, and if their objections are pronounced valid, will be allowed. So if the majority be for the proposed alteration, the parson is to be consulted; for his freehold is not to be disfigured with incongruities, and the symmetry of the Church is not to be destroyed. So again, the obstruction of the light, which would be a grievance to those seated in the body of the Church, would be regarded.

Vested rights.

In the judgment it is said, "If it be shown that the Church would be *sufficiently lighted*, or that it could receive *such additional light* by an alteration in the form of glazing the windows, the plea of the obstruction of the light would be bad." The terms "*sufficiently lighted*" and

Obstruction of light.

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"*such additional light*," are both at the best, but vague and uncertain, and if the definition is correct, the converse will hold. Is it therefore to be considered, that any interruption of the light, and which could not be supplied by an alteration in the form of the glazing, would be fatal to the application for a faculty? The erection of the gallery must in a degree be an interruption of the light, and if the text be true, fatal.

Erection of a gallery.

With all deference for a dictum from so great an authority as Lord *Stowell*, it is presumed, that a material obstruction of the light is intended, and the proof required would be of a most positive nature, for it would seem that the plea of the obstruction of the light, if proved, would be fatal; this construction of the words "sufficiently lighted," is contended for on the ground of the maxims of law, which hold, that all rules of law must be construed according to the dictates of common sense, or rather must not be irreconcileable therewith.

Plea, obstruction of light.

Therefore, pleadings which are based upon the rules of law must be reasonable; but it would be unreasonable to hold that a trifling interruption in the enjoyment of a common right, of which a few have possessed themselves, should act as a disherison of that right, in the case of numbers of others having a right equal to that of those in possession

So if the Church is old, and it be suggested

Plea, Church being old.

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that the walls will not bear the additional strain which the erection of the gallery would occasion. If proved, it would be a sufficient plea, and very properly so, for it is said, "if the Church falls down, the parishioners are not bound to rebuild it," (*Wood's Inst.* Bk. 1, c. 7, p. 89).

Faculty, when necessary.

"If churchwardens add any new thing to anything in the interior of the Church, the license or faculty of the ordinary is necessary, as well as the consent of the parishioners; for he is a judge, in law, of what is proper and decent there, and, in this case, the major part of the parishioners cannot conclude him, (*Wood's Inst.*, Bk. 1, c. 7, p. 89).

Faculty on erection of a gallery.

It is usual sometimes on decreeing a faculty for the erection of a gallery, in order, as it is alleged, to encourage contributions to grant a faculty to a contributor for a certain term of years of the pew allotted to him, as an annexation to his house, but which faculty, after the term has expired, can in no case be made the ground of a prescription; nor does it invest the descendant or alienee of him, who holds in right of the original grantee, with any property in the pew; for, on the lapse of the term, the right simply reverts back to the ordinary, as in the case of faculties upon condition, (*supra*, p. 56); but if the descendant or alienee of the grantee be in possession at the time of the lapse, the right to the sitting would still continue with him, but he would be then supposed to have been placed

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there by the ordinary, and his right would be only a possessory one.

Such then is a general summary of the reasons which can be used for or against the grant of a faculty for licensing the erection of a gallery.

Faculty for pulling down a Church.

A faculty, under certain circumstances, may be also for pulling down a Church, as in the case instanced, (*supra*, p. 63).

A faculty obtained merely for a new arrangement of the pews in a Church, would, of course, be governed by considerations differing from those adduced above, in the consideration of a faculty for a gallery; for in the case now under consideration, the general convenience of the parishioners, by affording a greater accommodation to them generally, would be the great inducement for the grant of the faculty, due regard being still had to those private rights which were existent before: whether created by faculty, or which have grown up by a prescription, and which will form the next heading of our subject.

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PRESCRIPTION.

Pews and vaults are not within the statute of the 3 & 4 Wm. 4, and, therefore, must be proven to have existed from time immemorial, (*Gibbons on Limitations*, 216, *et vide Statute*).

Pews and vaults, necessity of proof.

Walter v. *Gunner and Dewry*, 1 *Consist. Rep.* Sir *Wm. Scott.*] "A house built only eighty years, is not a building sufficiently ancient to establish a prescription, because the presumed evidence of a grant of a faculty is not extinguished in that time, (*Ib.* 319).

Prescription for eighty years.

Ancient house, insufficient proof, what.

"If there be a prescriptive right, it cannot be exercised by transferring it to other persons not resident in the parish, or inhabitants of a house therein, (*Ib.* 319); for it would be an illegal exercise of an exclusive right, (*Ib.* 322).

Prescriptive right, transfer of.

"To exclude the jurisdiction of the ordinary from the disposal of a pew, possession must be shown for many years, and that the pew, had been built time out of mind, and repaired; repairs being the strongest evidence of the right; repairs for thirty or forty years will not exclude the ordinary, (*Ib.* 322): the possession proved must be ancient, going beyond memory; I do not mean the high legal memory,

Jurisdiction of ordinary, what excludes.

Repairs for thirty or forty years.

Prescription, proof of.

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but it must go beyond this case (*i. e.* eighty years), (*Ib.* 322).

Six years possession against wrong doer.

"Six years possession is not sufficient against a mere disturber," (*Ib.* 322), *vide Gibson's Cod.* 222, *contrà*).

Rogers v. *Brooks and Wife, M.*, 24 *Geo.* 3, *B. R., in notis;* 1 *T. R.*, 431, *folio*]. "Where it was proved that the space whereon the pew stood was a blank space, or open pew, forty years before, and that the Church was pulled down and rebuilt, and that the rector and the churchwardens then put in A. It was held that thirty-six years' possession was sufficient to presume a legal title in A. (allegation being that the pew was appurtenant to a messuage)."

Thirty-six years' prescription.

On a motion for a new trial, Lord *Mansfield* held, that thirty-six years acquiesence was a sufficient presumption of the right; a gift cannot be made without faculty.

"On rebuilding of a Church, it is usual to leave the adjustment of the pews to the rector and the churchwardens," *Willes*, J.

Prescription, sixty years, as annexed to lands.

Woollocomb and Ouldridge, 3 *Add. Ecc. Rep.* 7].

"A prescription for sixty years and upwards for a pew, as an annexation to an estate, is a legal absurdity, for it can only be for a house, and never for lands only, and he who occupies the house is entitled; not he who possesses the land, and that though reparation had been pleaded."

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Griffiths v. *Mathews*, 5 *T. R.* 296]. Case for a disturbance; the pew was in the chancel, and laid, as annexed, to an ancient messuage, and was claimed as appurtenant thereto. The jury, under the circumstances of the case, which were the erection of the pew, &c., by another to accommodate a difference (and which time was within legal memory, being thirty years), by the permission of the vicar, were of opinion that the pew was not appurtenant to the ancient messuage, and gave their verdict accordingly. The rule was obtained for a new trial.

Forty years' prescription.

On cause being shown, it was held, "that whether the pew, under the circumstances, was appurtenant to the house, was a fair question for the consideration of the jury, and that, they appear to have decided rightly, where there is evidence to go to the jury, as in the case of *Rogers* and *Brooks*, (1 *T. R.* 428), that the right was immemorial, and not a new right; showing that the pew was enclosed forty years, is sufficient; but where the plaintiff declares upon a prescriptive right, and shows its commencement in very modern times: the pew is claimed as appurtenant to an ancient messuage, and is shown to have existed only since 1758, I think it is different, (*Ib.* 297), Lord *Kenyon*, C. J.

Prescription matter of fact for jury.

Prescription, insufficient proof of.

"A seat in a Church may be annexed to a house by faculty, or by prescription, and from long usage, a faculty may be presumed, and it is impossible to determine, *à priori*, what evi-

Presumptions in favour of a prescription.

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dence will or will not be sufficient to support such a right. If it had not appeared when or at whose expense this pew was built, or that it had not been a pew before 1758, possession from that time would have been a sufficient evidence to warrant the jury in presuming a faculty had been obtained by the plaintiff's ancestor to build this pew in the chancel, (*Ib.* 298), *Buller*, J.

Necessaries to establish a prescription.

"The jury should presume everything which they fairly can presume against a wrong doer, *Grose*, J." (*Ib.* 298). (Rule discharged).

Pettman, by his Guardian v. *Bridger*, 1 *Phill.* 316]. "A prescriptive right must be clearly proved; the facts must not be equivocal or inconsistent with the general right. It must be shown that use and occupation has been exercised from time immemorial, and as appurtenant to a certain messuage, not lands (for of such the ordinary cannot grant a faculty). It must also be shown that the inhabitants of the messuage upheld the right; as repairing at their own expense; the burden and the benefit must go together, mere occupation does not prove the right, however long the possession. Uniform and exclusive possession by the inhabitant of a messuage connected with the burden of maintenance and repair is the evidence necessary to establish a prescriptive title, (*Ib.* 325).

Repairs, what.

Cushioning and lining pew, effect.

"The mere putting cushions, and re-lining pew is not a matter of repair but of ornament,

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and is in no degree inconsistent with the fact of the pew belonging to the parishioners, such things are supplied by the occupants for their convenience. The proof of the repairs and the prescription will be very strictly required," Sir *J. Nicholl.*

Lining was held not to be repairing by *Littledale*, J., in 3 *Man. & Ry.* 393.

3 *Man. & Ry.* 393, *Bayley*, J.]. "The fact of enlarging a pew, though it would not destroy the prescription, might not operate upon the jury in exciting considerations whether such a prescriptive right had any existence at all, since, if it existed, the party would not hazard the right by enlarging the pew." Enlarging a pew, effect.

Gibson's Cod. 221]. "Reparation must of necessity be alleged, (in case of pews in nave and body of Church), because the ordinary, in the body of the Church, hath the right of disposing of the seats, and it is only private right, accoupled with reparation, which can devest him of it." Repairs, allegation of.

Gibson's Cod. 222]. "Priority of seat, as well as seat itself, may be claimed by prescription; the plaintiff claimed an upper seat." Priority of seat, presentation for.

Morgan and Curteis, 3 *Man. & Ry.* 387].

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It was proved that previously to the erection of the pew in question the site was occupied by two old open seats and a box, for the reception of the communion plate, and a stool beyond. The pew was built in the year 1773, by Lord Hood, who purchased a cottage in the parish, but the former possessor sat in the open seats, as did also strangers; the vicar, the lay-rector, and another had closed seats in the chancel: that in 1809 the altar steps were repaired by the parish. Lord Hood sold the property to the plaintiff, but said he did not sell the pew, and the conveyance was not produced. "The proof of the open seats destroys the prescription, and it was for the jury to say whether a faculty existed, and that it required strong evidence to induce the belief of the grant of a faculty to erect a seat in the chancel, belonging to a lay or clerical rector." *Park*, J.

Rebuttal of prescriptive right.

"The right of allotting the pews is virtually in the ordinary, and is exercised by the means of the churchwardens, and they place the parishioners in the different pews. Pews generally go with a house, but the mere occupation of a pew is not sufficient to force a jury to find a right. It is no uncommon thing to introduce the specification of pews into old title deeds, which is done with two objects, to have a sort of warranty of the right from the vendor, and to possess documentary evidence of that right. If there

Introduction of specification of pews into title deeds.

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had been any grant from the lay rector, the presumption is that the grant would be forthcoming," *Bayley*, J.

Prescription for a house not in the parish.

Lousley v. *Hayward and Another*, 1 *Y. & J.*, 585, *et seq.* *Macdonald*, C. B.]. "In a case of prescription for a pew in the body of the Church as annexed to a house not in the parish, uninterrupted possession was proved, and to defeat which it must be shown that the right was of necessity void in the beginning, unless the prescription itself was rotten and bad from some legal vice. "In early times Churches were founded or built by the lords of manors, or other lay founders, and parishes were not reduced to the exact circuits and boundaries by which they are now known and apportioned for ecclesiastical purposes. When Churches were first built, certain districts were allotted, over which the officiating minister had the superintendence, and this district was not a parish in the sense in which we now understand the word; their boundaries were settled long after the foundation of the Churches, and the ecclesiastical districts have since been much narrowed whenever other new Churches were built: how then is it to be said that the ancestors of the possessors, or of those with whose rights he is invested of the house or estate in respect of which this pew is claimed, did not build or endow the Church, or some part of it, and this

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house, though not within the bounds of the parish, was not within the ecclesiastical limits of the Church district. The distinction between a prescription for a pew in the body of the Church as annexed to a house out of the parish, and a prescription for a pew in the aisle is merely made a doubt or a question in some books, but there is no case in support of it, and there is no distinction in the reason of the thing itself."

Distinction between pew in body of church and aisle.

Prescription, evidence of.

Lofft. 423, *Ashurst*, J.]. "A pew being immemorially used with a house, is a ground of prescription, or building a pew may found a title; and it need not be alleged in the declaration, that repairs were done, nor need it be proved, for the pew might never have wanted any repairs. Memory, of which no man can remember to the contrary, is sufficient to support a claim of right. It is not necessary to prescribe from the time of Richard I., the repairs are only evidence of the right," (*Aston*, J.). "Perhaps a claim against common right, as in the case of a toll, requires consideration to be alleged and proved."

Repairs evidence of the right.

Repairs of one pew evidence of repair of others.

Pepper v. *Barnard*, 7 *Jurist*, 1128]. A pew in the parish Church of Dunmow was claimed in respect of an ancient house in the parish. The house to which the pew was claimed as appurtenant, was proved to be sufficiently ancient. It was also proved that there were three adjoin-

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ing pews, one of which was occupied by the family, one by the servants and one by a farm tenant. The farm house was anciently a mansion, and the residence of the family. As to what is proof of a prescription, *Buller*, J., was quoted, (5 *T. R.* 298).

"The plaintiff in this action being of the Roman Catholic religion and many of the servants, it accounted for the unfrequency of the occupancy, the verdict was for the plaintiff. On a motion for a new trial, it was held there was sufficient proof at the trial to warrant the jury in finding the prescription. "It appears that all three pews were used under one and the same cause of right, that is, in respect of an ancient messuage, and the proof of repairs done to one, furnishes some evidence as to all, and, of course, among the rest, to the pew in question, the rule was discharged," (*Ib.* 1129. Lord *Denman*).

Right to remove seats in parson.

Degge's Parson's Counsellor, by Ellis, 7th ed. 209, 213]. "Though the freehold of the Church is in the parson, he cannot pull down any seats anciently erected, or of late erected, but by the license of the bishop or consent of the churchwardens." (*Vide note, citing* 1 *Phill.* 235, Sir J. *Nicholl, contrà, ib.* 214).

Prescription in right of ancient messuage.

"A man who is owner of an ancient messuage may prescribe for a seat in any part of a parish Church within which parish the

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messuage stands, although he be not used to repair it." (*Ib.* 214).

Prescription for seat.

Watson's Clergyman's Law, 713]. "It was formerly held that a person could not prescribe for a seat (*citing Moor*, 878), but if it be in an aisle, remedy for disturbance shall be at the common law (2 *Buls.* 150); and it was also said a pew cannot belong to a house, though the opposite is now held. If a man has a house in a parish time of mind, and he and those whose estate he hath have used a certain pew, and the ordinary displaces him, he shall have prohibition, for by prescription he has as good a right to the seat as he has in the house (*vide supra*, p. 17, *contrà*), which seems to be now settled (*citing* 12 *Coke*, 106). In action on the case for disturbance, plaintiff may entitle himself without alleging repairs, but for a prohibition, repairs must be shown. Against a wrong-doer a great nicety need not be used in setting out a prescription, for a general prescription for a seat in the Church which he and they whose estate he hath had repaired as often as was necessary, it was held sufficient, though the allegation was not that they repaired the seat," (*citing* 2 *Levintz*, 193; *infra*; *Ib.* 714).

Action on the case, disturbance.

Prohibition.

Prescription, what.

A prescriptive right to a pew is based upon the supposed grant of a faculty, in which case

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the prescription must be proved in that way in which prescriptions are only capable of proof, that is, by uninterrupted and long user, an user extending far beyond the memory of living man, and of which no origin can be shown, yet the very strictness of legal memory is not required in cases of the description which are now under comment (*supra*).

Proof of.

It is laid down by Mr. *Phillipps*, in his book *on Evidence* (vol. i. p. 504), "that if a prescription be alleged in bar, it is an entire thing, and must be proved to the extent laid;" and further (in p. 510), he says, "A party must prove a right commensurate with that claimed." Such are the proofs which would be necessary in an action against the ordinary, but as against a wrong-doer, the proof required would not be of so strict a nature.

Against ordinary.

Against wrong doer.

As the prescription is supposed to be based upon the prior grant of a faculty, so the supposition is never limited to the grant of a faculty merely for the life of the person who obtained it, but is always founded upon the supposed grant of a faculty of the largest extent, and as appurtenant to a house, and, therefore, the house to which it is laid as appurtenant, must be ancient, and that in the fullest acceptation of the word. Proof of the enjoyment of a pew for eighty years, (*supra*, p. 77), was held insufficient to confer a title, because it was shown that the house to which the pew was claimed as appurtenant, had not been

Prescription, proof of.

Enjoyment of pew for eighty years, effect.

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built for a longer period, and the time was held as too short to favour the assumption of a grant of a faculty, whilst on the other hand, proof of possession for thirty-six years, (*supra*, p. 78) was deemed sufficient, for there were grounds for supposing that though the holding of the pew was comparatively new, still as the Church had been rebuilt about that period, it was assumed that the new right was founded upon an old one, especially as the house, in respect of which the pew was claimed as annexed, was an ancient one.

Enjoyment for thirty-six years, effect.

It may, therefore, be assumed that when the prescriptive right is claimed as annexed to an ancient messuage, and repairs be shown, or in the absence of the proof of the repairs that it be not shown that the parish had repaired (for by possibility the pew might not have wanted any repairs within legal memory), the proof will be allowed, so even proof of repairs by the parish may be rebutted, it is conceived, by showing some special circumstances or remonstrances against such usurpation of the right, for the repairs might have been done for the express purpose of avoiding the right which the faculty conferred upon the grantee.

Proof of repair by parish, how rebutted.

If the claim be for several pews as appurtenant to a house and repairs be shown to have been done to one, in the absence of evidence to the contrary, it was held to be evidence of the repair of all the pews, (*supra*, p. 84). Mere ornaments, as linings, cushions, hassocks, carpets, &c., will

Claim for several pews, repairs done to one.

Lining, carpeting, cushions, &c.

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not be considered at all in the nature of repairs, but merely as luxurious additions adapted to the taste, or placed there for the purpose of furthering the comforts of the possessors.

Repairs, what.

The repairs necessary to be proved are such as are of a substantial nature, as new flooring, repairs of door, seat, steps, &c. &c., and where repairs are proved, it is not always a conclusive evidence even though the proof of the repairs extends to a period of forty years. It may be that the repairs were done with the covert intent of raising a prescriptive right, and thereby depriving the ordinary of his power to appoint, and in rebuttal of the supposed right, the rule of law would step in that no man shall take advantage of his own wrong.

Repairs, rebuttal of the presumption.

Consolidation of two parishes.

Prescription, when claimed, must be claimed as annexed to a house in the particular parish wherein the Church is situated, but not in that of an adjoining one, unless the two parishes had been consolidated, in which case, in law, the two would be only one parish; but the consolidation, to prove a prescriptive right to a pew as annexed to a house in the parish in which the church was not, would have to be shown, as of a very ancient date, fully as long as that which would be necessary in the proof of a prescription, if not of a longer period (*a*).

(*a*) The consolidation which is here spoken of, is not meant one which has taken place in accordance with the enactments of the statutes of the 17 Car. 2, c. 3.

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It was laid down by Chief Baron *Macdonald*, in one case, *Lousely* v. *Hayward and Another*, (*supra*, p. 82, *see Appendix for this case at length*), that a pew might be claimed in the body of the Church, as appurtenant to a house, though it was situated in another parish; because, he says, the house, though it is not now in the parish, yet, it might have been within the ecclesiastical district, and hence possibly the house of the founder of the church; and then commenting upon the difference between a pew when in the aisle (of which hereafter), and when in the body of the church, he says, the distinction is merely made a doubt or question in some books, (*vide supra*, 83, *et infra*, p. 112).

Claim of a pew as appurtenant to a house in another parish.

With all respect and deference for the opinion of the learned Judge, it is submitted such a reason would not be a valid one, for districts were severed and apportioned into parishes at a time long anterior to that of pewing the churches, and if the reason for the division is correctly rendered (*supra*, p. 2, *et seq.*) it would be impossible, but that the founder's house would be situated near the Church, and it would be as *easy to show* that the house, in respect of which the right is claimed was the residence of the head family of the district, as it would be *reasonable to suppose* that the house of the founder of the original Church was in the after severance of the district into parishes or manors, excluded from its place, or situated in a manor of which he was not the

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lord, both of which, it is apprehended, would be incapable of proof.

If a man possessed the seignioral rights and the property of a manor, and aliened them, he thereby parts with the lordship and the property of the manor, and with such rights as are incidental thereto, among which would be the occupancy of that particular part of the Church he had chosen for himself, for the faculty cannot be removed from the messuage to which it is appurtenant, (*supra*, p. 34), and which, as will be seen, (*infra*, p. 101) was usually the chancel, an aisle, or private chapel, and then the alienee would claim the rights which were before in the lord as the founder of the original district Church, and he would claim not in right of the estate, for a claim in respect of land is bad, but of the messuage erected thereon.

Alienation of manor and seignioral rights, effect.

It is presumed the particular manor in which the district Church was situated would, in the after severance, become the parish of the Church, and the cure of its minister, because the lord, on parting with this manor, would part with the advowson of the Church, unless it was specially reserved, and most likely he would not choose that his alienee should profit by his tithes for the presentation to the Church would be in the grantee, and it may be reasonably supposed the lord, in the exercise of the right then universally claimed, would build and endow another Church with the remaining part of his tithes, (*supra*, p. 3).

Severance of a district, probable effect.

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Claim through the founder.

The claim through the founder could only enure, provided there was a house on the manor, for it might be the Church was built in one manor of the seigniory and the house in another, and yet both be in the same lordship, and constitute only one parish, for several manors are often found in a parish, but rarely more than one parish in a manor. Churches were supposed to be built originally for the convenience of the lord and his tenants, and therefore it is reasonable to suppose the Church would be near his residence for his special convenience, and most certainly within his own boundaries.

Right to build and endow Churches.

To pursue the argument, we will suppose the lord aliened the manor whereon the house was built, and the new lord following the custom, which was then general, built a Church, and endowed it with his tithes, the then parish or district would of course be severed, the new Church being sufficient for the spiritual wants of those inhabiting that part of the district wherein it was built, the right appertaining to the house in right of the founder, *viz.*, the attendance upon the old Church would fail, for the necessity of its occupant has ceased, or it might be the new lord had erected another house for himself on the manor, then he would most probably annex his right as the founder to his new house, in which it is likely he would reside. But on the building of his new Church the rights annexed to the old messuage in respect

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of the founder of the original Church would fail. The building of the Church would show a clear intention of abandoning the old right, for he provides for the wants of the inhabitants of the house in a place different from that appointed by the supposed grant. On the other hand, the founder having parted with his messuage has parted with that which was the channel by which his right was preserved, for the supposed grant would not be appurtenant to the person, but to the house (unless it was a grant for life, which would only enure during residence), and if he built another house, the right he would acquire would not be that of founder, but in respect of his being the chief inhabitant of the parish.

Abandonment of right as founder.

The claim, it is admitted, is prescriptive, and which is supposed to be based upon a faculty; if then the faculty, and which case after case has shown must be the foundation of a prescription, was void on its being granted, no user, however extensive, could convert it into a right; a grant to a man not being a parishioner would be a *nudum pactum*, for it would be made without consideration; and a grant, when it interferes with the rights of third persons, must be made upon consideration, (*supra*, p. 47, *in notis*), whatever might be the construction as between the grantor and grantee; and if, on the other hand, the claim was even founded upon a prescription in the usual (not in the limited) sig-

Claims by prescription.

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nification of the term, it would be necessary to show user beyond the time of Richard 1, and it has been indisputably shown by *Selden*, that Churches were not pewed until after the Reformation, except in very rare instances, and the exceptions were only in favour of a few very great families, (*supra, p.* 11, *note*).

Division of districts into parishes.

Districts were divided into parishes at a time long before the period of the Reformation; if then the division into parishes was before the pewing of the Churches, how could it be possible for a stranger to acquire an exclusive right to a particular spot in the body of a Church wherein the very parishioners themselves had no part of the Church exclusively appropriated to themselves; and if such an anomaly as the claim of a stranger was existent among them, it would be a circumstance which would be certainly handed down from generation to generation, and also the claim of right by which the appropriation or grant was acquired, and it would not be unreasonable to presume that some documentary evidence would be forthcoming to support so singular a claim.

Claims of non-parishioner by prescription.

The prescription supposes a faculty, and a faculty which is a grant must have been made upon consideration, and the only consideration, (*supra*, p. 71), which can be given in exchange for the faculty, would in this case be wanting, and the grant would of necessity be void.

Upon reviewing arguments submitted, it is

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contended, a prescriptive right can only be claimed in respect of a house in the parish, the case above adverted upon is the only decision wherein the contrary is held, and which decision with great diffidence it is suggested is untenable, as being opposed to the principles upon which the law of pews is grounded, (*vide infra*).

Non-parishioner, claim by prescription.

And it has been judged well, in order to support the arguments adduced above to collect the authorities, which are scattered through this work, and, bearing upon this particular case, into the form of syllogisms, that the proof may be rendered more clear.

DUTY.

Duty of attending Churches.

Every obligation enjoined by law is a duty. "The attendance upon the public services of religion is enjoined by law." (5 *Burn's Justice*, tit. "*Lord's Day*").

THEREFORE: attendance upon the public service of religion is a duty.

CHURCHES AND INCIDENTS.

Churches, attendance in.

Churches were founded for the public and convenient administration of the offices of religion, and are by law appointed for the attendance of the inhabitants of the district or parish wherein they are situate, (*supra*, p. 1).

THEREFORE: the parish Church is the place wherein such duty is to be performed.

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Right inherent in parishioners.

The liberty to sit in the parish Church (*b*) during the public administration of the offices of religion is inherent in the parishioners, (*supra*, p. 9).

THEREFORE: it is a right common to the parishioners.

Obligation to repair parish Church.

By law those who are entitled to seats in the parish Church are bound to repair it, (*supra*, p. 8).

Parishioners alone are entitled to seats therein, (*supra*, p. 9).

THEREFORE: they alone are the persons bound to repair it.

FACULTY.

Faculty, what.

A faculty confers an exclusive right, (*supra*, p. 32).

An exclusive right is incompatible with a common right, (*supra*, p. 65 and 70).

THEREFORE: the faculty ousts the common right.

A faculty is a grant, (*supra*, p. 32, *et infra*).

A grant must be supported by a consideration, (*supra*, p. 47, *in notis*, *et* 65).

THEREFORE: a faculty must be supported by a consideration.

CONSIDERATION.

Consideration for a faculty.

The consideration must be certain, (*supra*, p. 67).

Repairs are uncertain, (*supra*, p. 67 and 68).

THEREFORE: repairs cannot be the consideration.

(*b*) Chapels wherein the Ritual of the Church of England is used, are here included under the general word "Church."

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The consideration must be an act to be done or forborne, (*supra*, p. 68).

Residence is not an act to be done or forborne, (*supra*, p. 70).

THEREFORE: residence is not a consideration.

The consideration for a faculty must be coeval therewith, (*supra*, p. 32) (*c*).

Residence is not coeval, because it must have been pre-existent (and continues unchanged), (*supra*, p. 70).

THEREFORE: residence is not the consideration.

Common right of parishioners.

A seat in the parish Church is a common right, (*supra*, p. 17).

The cession of such right is an act done or forborne, (*supra*, p. 68).

THEREFORE: it is a consideration.

There can be but one consideration for a faculty, (*supra*, p. 71).

The cession of the common law is a consideration, (*supra*, *ib.*).

THEREFORE: the cession of the common law right is the only consideration.

Grant of a faculty.

The consideration for the grant of a faculty

(*c*) It is said that the consideration for a faculty must be coeval therewith, because the only consideration which can arise is one by implication, *viz.*, the cession of the common law right, and which is coeval, the right is not coeval, but the cession is, for it must take place (or rather be implied) immediately upon the grant being acted upon (*supra*, p. 6).

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consideration for.

must be the cession of the common law right, (*supra*, p. 70).

A non-parishioner has no such right to cede.

THEREFORE: he cannot be the grantee of a faculty.

GRANTEE OF A FACULTY, WHO MAY BE.

Grantee of a faculty—new incidents.

A parishioner to be the grantee of a faculty must be resident, (*supra*, p. 32).

All parishioners are not resident within the parish, (*supra*, pp. 12 and 13).

THEREFORE: every parishioner cannot be the grantee of a faculty.

Grantee of a faculty, who may be.

A faculty can only be granted to an inhabitant householder of the parish, (*supra*, p. 31).

A non-parishioner is not an inhabitant householder of the parish.

THEREFORE: a non-parishioner cannot be the grantee of a faculty.

PRESCRIPTION.

Prescription.

A prescription for a pew pre-supposes a faculty, (*supra*, p. 79).

A non-parishioner cannot receive the grant of a faculty, (*supra*, p. 32).

THEREFORE: a non-parishioner cannot prescribe.

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CHANCELS AND AISLES OF CHURCHES.

The aisles and chancels of Churches are governed by other considerations (2 *Add. Eccl. Rep.* 439) than those enumerated, and of which it will be necessary shortly to treat.

Prescription by rector for chief seat.

Com. Dig. tit. "*Esglise.*" (G 3)]. The rector ought to repair the chancel of the Church: he may, therefore, prescribe for a seat therein, and allege he hath the rectory impropriate.

Custom for inhabitant to repair chancel.

Bishop of Ely v. *Gibbons and Goody*, 4 *Hag. Eccl. Rep.* 160, *per Curiam*]. There may be a custom for the parish to repair the chancel, in which case if the custom be found by a jury, it will, in the Ecclesiastical Court, be considered as valid, and a composition or an agreement will be presumed.

Custom in London.

In London the custom for the parish to repair the chancel exists generally, it may be upon peculiar ground; but the inference is, that such a custom may exist in country parishes, (*Ib.* 163).

Repair of chancel.

Though the burden of the repairs rests upon the rector, lay or spiritual, yet the use of the chancel belongs to the parishioners for the celebration of

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the communion, the solemnization of marriage, and that part of the morning service which is directed by the Rubric to be read from the communion table, and which is appointed to stand in the body of the Church or the chancel. The ordinary is the protector of the rights of the parishioners, future as well as present, and he must take care that their accommodation is not unduly prejudiced; therefore his assent is necessary to enable the rector to make vaults or make pews therein, (*Ib.* 171, Sir *J. Nicholl*).

Such a custom also is in other cities and large towns where there are no tithes to be charged for the repair of the chancel, (*Wood's Inst.* bk. 1, c. 7, p. 90).

The chancel by the custom of England shall be repaired by the incumbent, (*Gibson's Cod.* 223), or him to whom the repairs belong, (*Ib.* 222), it may be the custom for the parish to repair it, (*Ib.* 223).

Impropriator, repair of chancel.

The impropriators are of common right bound to the repair of the chancel, and as before rectories became lay fees, they were liable to sequestration, and as the King was to enjoy them as the religious had done; only what they enjoyed, therefore, was conveyed, (*i. e.*) the profits above finding the service, repairs of the chancel, and other ecclesiastical burden: 31 Hen. 8, c. 13, s. 14, saves all rights any person had before.

It would, therefore, seem to follow, that they

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might be compelled to repair by sequestration, but it has been held they could not, and the argument used against it was, that the allowance of such a step would be giving the ordinary power to augment vicarages, as they might have done and did before the dissolution of the monasteries.

Repair of chancel, how compelled.

Ib. 223]. The repairs of the chancel is a discharge from the repairs of the Church, but the impropriator is rateable for the repair of the Church on such lands as are not parcel of the parsonage, notwithstanding his obligation as parson to repair the Church.

Repair of chancel, effect.

The seats in the chancel are under the disposition of the ordinary in like manner as those are which are situated in the body of the Church, because the freehold of the Church is as much in the parson as the freehold of the chancel, and this hinders not the authority of the ordinary in the body of the Church. The rector impropriate is entitled as such to the chief seat in the chancel as of common right, in regard to his repairing the chancel, but it may be that by prescription another parishioner hath it, (*Ib.* 224, *vide Gib. Cod.* 222), wherein he says, "when the repairs are done by the parish the common right of the ordinary ensues," (*infra*).

Seats in chancel.

Authority of ordinary to seats in chancel.

Rector, right of seat.

Chief seat in chancel in a parishioner.

Spry and Flood, 11 *Curteis*, 356]. A rector would be entitled according to the common law to the chief seat in the chancel, whether he be

Chief seat in chancel.

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endowed rector or spiritual rector only, unless some other person is in condition to prescribe for it himself from time immemorial (1 *Noy*, 133), and the Ecclesiastical Court would allot the possession to him of such sitting, and protect him against the disturbance of his right.

Repair of the chancel, who is liable to.

1 *Degge's Parson's Coun.* by *Ellis*, 7th ed. 209, citing 1 *Mod.* 258, 2 *Mod.* 254]. By the canon law and the custom of England the repair of the chancel is to be done by the parson, and he is compellable thereto by ecclesiastical censure, suspension, and sequestration, as if there be a perpetual vicar to the vicar. (*Com. Dig.* "*Esglise*" (G 2)). The lay impropriator is compellable to do the repairs by ecclesiastical censure, for he is chargeable therewith, but the impropriate tithes cannot, therefore, be sequestered.

Impropriate tithes, sequestration of.

Impropriate and appropriate, difference between.

Watson's Clergyman's Law, 710]. An impropriation is when the parsonage is in lay hands. An appropriation, when it is in the possession or some ecclesiastical corporation, sole or aggregate. Corporations aggregate are not capable of excommunication, (*Ib. note*, 59).

Aisle, right to, by prescription.

If an inhabitant of a parish, time out of mind, has been used to repair the aisle of a Church, and to sit there with his family and bury there, it makes the aisle proper and peculiar to his house, (*Etiam Gib. Cod.* 221), and he cannot be displaced. The mere user without repair confers no

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pre-eminence, for by the user and the repair the presumption is, that the aisle was erected by him whose estate he hath. If the ordinary places another in a seat in the aisle with the proprietor, an action on the case would lie against him, and if he be impleaded in the Spiritual Court prohibition will lie.

Placing another in seat with prescriber.

If a private person sits in the proprietor's seat, or buries in the aisle without his consent, action on the case will lie, and that though the fee of the aisle is in the incumbent, (*Ib.* 710, *et seq.*).

Sitting and burying in aisle, without consent of proprietor.

Rogers v. *Brooks, in Notis,* 1 *T. R.* 431, *folio, Bayley, J.*]. An aisle is always supposed to be held in respect of a house, and will go with the house to him who inhabits it.

Aisle annexed to a house.

Gibson's Cod. 221, *et seq.*]. In a prescription for an aisle repairs need not be alleged, because the particular persons are supposed to repair, so they need not show it: the foundation of the right may be for other causes than repairing, as being founder or contributing to its building.

Allegation on prescription for aisle.

1 *Burn's Eccl. Law,* 357]. Though the churchwardens are not chargeable with the repairs of the chancel, they are with the supervision thereof, to see that it be not permitted to dilapidate, or fall into decay; and when dilapidations happen and no repairs are done, they must make

Repair of chancel, churchwarden's duty.

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a presentment thereof to the ordinary at the next visitation.

Aisles annexed to a messuage.

Frances v. *Ley, Cro. Jac.* 366]. If an inhabitant and his ancestors have used, time out of mind, to repair an aisle in a Church, to sit there with his family, to hear divine service, and bury there, it makes the aisle peculiar to his house, and he cannot be displaced by the parson, churchwarden, or even by the ordinary himself; but sitting and burying without repair doth not gain any peculiar property, and if the aisle be repaired from time to time by the parish, the ordinary may appoint whom he pleases to sit there, notwithstanding any usage to the contrary.

Sitting and burying without repairs.

Prescription for an aisle in right of land.

Watson's Clerg. Law, 715]. The question whether the prescription to an aisle in a Church as belonging to a manor, where the person hath only land, was not resolved by the Court, yet they were inclined to think the prescription was not good.

Grant of chancel by rector.

Clifford v. *Wicks and Another*, 1 *Barn. & Ald.* 498.]. Trespass for breaking pews in the chancel held under grant from a former rector (*in arguendo Campbell*), if the rector had the power of aliening he might alien the whole or part of the chancel to the inhabitants of a different parish, and the parishioners be thence excluded

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from the chancel, and, perhaps, ultimately, by increase, be deprived of sitting in the Church.

"Held, the plaintiff could not recover, for this is a grant to him and his heirs of a part of the chancel, not to be held as chancel or to be used as such, but generally without guard or restraint whilst in the hands of the rector, it is under restriction and regulation, but in the hands of a grantee that restriction ceases; it is the duty of the rector to retain such power over the chancel as to enable him to see that it is appropriated to the purposes for which it was originally built." (Lord *Ellenborough*, C. J., 506).

Rector right to pew.

"The rector is entitled to the principal pew, but the ordinary may grant permission for others to sit there; but in this case it would be taking the chancel out of the jurisdiction of the ordinary." (*Bayley*, J., 507, *Ib.*).

Annexation of a seat to a messuage.

"The rule that the ordinary cannot grant a seat in the body of the Church without annexing it to a messuage, applies to the case of a seat in the chancel, the rector cannot make a grant like this, which is inconsistent with the rights of the parishioners, nor deprive succeeding rectors of the power of disposing of the right of seats and sepulchre, to future inhabitants of the parish." (*Abbot*, J., 507, *Ib.*).

"No part of the chancel can be separated from the rectory, and the rector has the fee of it in the same manner as he hath of the Church and the churchyard; before the dissolution of the

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monasteries he could not have aliened any part of it without the assent of the ordinary, and in 31 Hen. 8, c. 13, s. 14, there is a saving clause which leaves such right as it existed before, and the chancel is, therefore, inalienable in the rector." (*Holroyd*, J., 508, *Ib.*).

Chancel and aisle, what.

The chancel and aisle of a Church, which latter is said to be a small chancel or chapel, are never in the original right held by faculty, but must be always prescribed for, though where the ordinary has gained the right of appointing the parishioners to seats in the chancel or aisles, in common with the body of the Church, he could, doubtless, grant a faculty for any part thereof to a parishioner's exclusive use; the considerations upon which an exclusive right in the chancel or aisle is held, is very different to that of an exclusive right to a pew in the body of the Church, the prescription which springs from a faculty, and the consideration on which the grant is based, has already been explained, (*supra*, p. 67), but the consideration for the holding of a pew in the chancel or aisle, is grounded upon the supposition that the ancestors of the claimant in the case of the chancel was the founder of the Church, and in that of the aisle that it was built by the claimant's progenitors, or that they had aided the Church by donations; such is, then, the difference of the consideration of the two claims. It is apprehended, therefore,

How acquired.

Difference of consideration from pews in body of Church.

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that it cannot be said, that by having an exclusive place in the chancel or aisle, the common law right, which every parishioner hath in the body of the Church, is gone. If the proprietor of a seat in the chancel was to accept a seat in the body of the Church, by the appointment of the ordinary, it would not avoid his right to the pew in the chancel, for such an act would show no abandonment, the seat in the chancel being held in the right of the founder, whilst that in the body of the Church is held by the common law right as a parishioner, and there would not, therefore, be anything incompatible in the joint enjoyment of them. The holding of an exclusive right in the chancel, as being by descent from the founder, is borne out by the fact, that a non-parishioner, as it is said, may prescribe for a seat in an aisle, but which, it is presumed, is very doubtful. Between a prescription for a pew in an aisle, and a pew in the body of the Church, *Macdonald*, C. B., (*supra*, p. 83), said he saw no distinction, for if a non-parishioner could prescribe for one place, he could for the other.

Acceptance of a seat in the nave, by pew holder in chancel.

Prescription for an aisle, examination of.

The observations which have been made above, (p. 90, *et seq.*), would in some degree apply to this case, though not with equal weight, as they would to a pew situated in the body of the Church. It is not very difficult to suppose that a non-parishioner might be a great donor to the Church, and the right of sitting in an aisle might be granted by the ordinary with the assent of the rector and

Non-parishioner donor to a Church.

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Grant of a pew right to a non-parishioner.

parishioners, and that without an infringement of the common right of every parishioner as to sittings, and which right applies most particularly to seats in the body of the Church; and if the grant upon such a consideration is valid, it would, it is contended, be so only for the life of the rector, and not for a longer term.

Reasons as to its invalidity.

The freehold of the Church and churchyard is in the parson, and, therefore, it would be an ousting of future incumbents from their right, and so, also, that of the succeeding parishioners, for *they* gain nothing in exchange; it will, perhaps, be answered, the same may be said of the grant of a faculty for an exclusive sitting in the body of the Church, the cases are not exactly parallel, for in the latter, the parishioner, to whom only the grant can be made, gives up his common right, whilst in the former it is an encroachment upon the common burying-ground, and, therefore, an infringement upon his right at common law of being buried in the churchyard without charge for breaking the ground, whereas by the custom of England the clergyman may charge for burying in the body of the Church and the chancel, (*Com. Dig.* "*Cemetry*," (B)), and where there is a custom, the churchwardens also, for they are bound to repair the pavement. When the prescription is for an exclusive right to sit, and bury in an aisle, the clergyman looses his right to his customary fees. On the prescription being lost, by those in whom the right is vested, the right to bury in the aisle would not

Grant to non-parishioners' encroachment on the parishioner's rights.

Right to be buried in the churchyard.

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return to the parishioners, as being part of the churchyard, but would be in the parson, as now constituting a part of the Church.

It is doubtful, to say the least, whether such a prescription can hold if tested by the principles of law which should guide grants of this nature. A contract must be upon a valid consideration, and which must be imperatively to do some act, or to bear some burden, or forbear some right; and if it be not imperative, the contract must of necessity be void, unless in cases where the law will raise an implication and compel satisfaction; It cannot be said that repairs which are only an evidence of the right, can be taken in the nature of a consideration, for there could be no compulsion to do them, even in the case of an aisle, and the Ecclesiastical Court would have no power to compel them to be done.

Repairs, whether compulsory.

If the aisle became dilapidated, the churchwarden could only make report of it at the next visitation, and the ordinary would direct the repairs to be done; if they were done by the prescriber, of course his right would remain, but if by the parish, his right would be for ever gone, and the common right which parishioners have in the nave of the church, would extend to the aisle.

Duty of churchwarden.

Repairs to aisle, done by parish.

If the building of the aisle was a good consideration, it would extend through the whole duration of the thing, and so long as it existed, so long would the right enure which the consi-

Building an aisle.

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deration purchased, for a consideration is a thing perfect in itself, the building may confer the right to sit, but the repairs are something extrinsic, and are, as it is rightly said, "an evidence of the right." If the right itself was conferred by grant, and the grant itself was *in esse*, what evidence should be necessary other than the production of the instrument? and which, if the consideration was perfect in itself, would be sufficient; custom, it is said, imposes the repairs, if the consideration was good, and the grant itself valid; custom could in nowise control it, for customs must be reasonable. If the repairs were made a part of the consideration, then the repairs would be imperative. If the repairs be not done, the rights of the other parishioners, are interfered with, and the Church rendered inconvenient by the want of their being done, and, therefore, is it, on neglect, the parish takes the burden, and as it is an axiom of law that the burden and the benefit should go together, the rights which the builder held is ousted, and that of the parishioners vests.

Money given as a consideration for a faculty.

In the consideration of the grant of a faculty, it has been shown before (*supra*, p. 17), that if it be proved that money was given as the consideration for a faculty, it would be void; even money given for the purpose of building a gallery was held an invalid consideration, though faculties are sometimes granted for a term to persons having contributed towards the building of a

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gallery, but their contributions have been received, not as considerations for the faculty, but as donations towards the building or the repairs of the Church. A parishioner only could be the recipient of such a faculty, and which was attached to his messuage. In the case of an aisle, it is said the building and the repairs are the consideration.

The building of the aisle may be, it is said, the inducement for the grant, but it is very questionable whether it can be the consideration, for if it were, to say the least, it might create very great confusion.

Consideration for grant of an aisle, examination of.

If a non-parishioner may prescribe for a seat in an aisle, it, with equal reason, may be urged, he can sell his right, for his holding must be for a something extrinsic of that necessity which is the usual foundation to a claim for sittings. We have seen (*supra*, p. 104), where in a case which came before the Court, and in which the question was, whether a man could prescribe for an aisle in the chancel as lord of the manor in which he held only lands? The inclination of the Court was, that such prescription would not be good. How much greater then would be the force of the reasoning as applied to any other person? Shall the mere holding of a house in another parish, coupled with a tradition of some benefit conferred upon the Church, be greater than his right? who, though he only holds lands, most probably represents the founder of the Church

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itself and who pays, besides his quota, for the repair of the Church in respect of the lands which he holds.

The books contain no express decision, wherein it is positively laid down that a prescription by a non-parishioner for a seat in the aisle is good. Though *Macdonald*, C. B., held the prescription might be for a seat in the body of the Church, which is certainly putting the case in the very strongest points of view (*supra*, p. 83). His decision have been before discussed in this Treatise; it proceeded upon the ground that if a non-parishioner could precribe for a seat in an aisle, he might also do so for a seat in the body of the Church. It must be admitted, if the reason is good in one case, it would apply almost with equal force to the other, but if the principles of law are to be the guide, the very foundation of the right, which is the inducement and consideration, fails in both cases (*i. e.*), habitation and the common law right to a seat in the Church.

Prescription by non-parishioner, failure of consideration.

The case of *Barrow* v. *Keen*, reported in *Keble*, and as *Barrow* v. *Kew* in *Siderfin* (*infra*), it is apprehended, is greatly the cause of the confusion which has arisen upon this subject: this case was a motion in arrest of judgment. The declaration in the original action (which was trepass for breaking a seat) stated that the plaintiff was an inhabitant of another parish, and prescribed for the aisle of the Church. The defendant, instead of demurring, pleaded in

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justification, that, because he has a house in the parish, &c., and traversed prescription, and the verdict was against him. When the case came on for hearing at Bar, the Judges held, "a prescription for a seat by an inhabitant of another parish is ill, unless he prescribed for a seat, or *pro sedile*, or show he used to repair, but after verdict, these are intended."

The terms of the judgment appear to be contradictory, for, in one part, the Judges held that a prescription for a seat by a non-parishioner is ill, and then say, unless he prescribes *pro sedile*, or shows repairs. This latter is probably some inaccuracy in the reporter. The case is somewhat important, for it is the foundation for the dictum in the various books, and which were, in a great degree, the aids by which *Macdonald*, C. B., arrived at his conclusion. It is apprehended, the case, as reported, does not at all bear out the conclusions which have been deduced therefrom. It came before the Court, not in a shape to try the prescription, and, therefore, cannot be held to be conclusive; if instead of being a motion for a new trial, if it had been a demurrer, the right would have been fairly in issue, and the conclusion, at least an authority, but which is at the present open fairly to a doubt.

Right of rector to chancel.

The right which the rector possesses in the chancel, is one which must be exercised in such a manner as not to interfere with the convenience of the parishioners, it is not a right which he

can alien as he would his house or lands, but one of which he is possessed for a special purpose, and in which he has only a qualified right of freehold; and it was held in a case (*supra*, p. 104), where a rector aliened a part of the chancel, that it was a bad grant, for he holds under the surveilance of the ordinary, on the ground, it is considered, of a supposed privity between them, but which would not exist as between the ordinary and the assignee. If then the rector cannot grant a right or exemption, how, it might be urged, is it possible for a non-parishioner to gain such a right in an aisle as will support a prescription? And, it is contended, that if the rector has not the power to alien a part of the chancel to a parishioner, no one can have such a right in the churchyard as to allow its being covered and connected with the Church in defeasance of the parishioner's rights of burial.

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CHAPELS.

It will be necessary, before this subject is closed, to comment shortly upon pews in chapels. Showing in what cases they are governed by other rules than those of the common law, and how this difference has been created whether by special grant, custom, or express enactment, and how, and in what cases the common law right may attach to them. It will, therefore, be necessary to show what a Chapel is, how it is constituted, and what are the forms of its government, and that, whether they be proprietary, or originating from statutory enactments, &c.

Chapel, derivation of the word.

There are several opinions as to the derivation of the word *capella* or Chapel, but as none of them are so pointed as to indicate the use, it is unnecessary here to speak of them.

Sorts of chapels.

Of Chapels, there are only three sorts, *viz.*, free Chapels, Chapels of Ease, and private Chapels recognised by the Ecclesiastical Law, but of late times, a fourth has been added, called proprietary Chapels.

Free chapel.

Free Chapels, by the 1st of Edw. 6, c. 14, were, with some few exceptions, given to the King, from the supposition that they were builded by the Kings or by persons through their express license,

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and were exempted from the visitation of the ordinary, and though the head or members receive institution from him, it may still continue a free Chapel, (*Gib. Cod.* 237); so it is said, the King may license a subject to found a Chapel within such exemption, which Dr. *Gibson* seems to doubt, (*Degge's Parson's Counsellor, Ib.* 185, 237), and it is perpetually maintained and provided with a minister, without charge to the rector or the parish, (1 *Wood's Inst.* bk. 1, c. 3, p. 31; *Wats. C. L.* 645 (S. P.)): such Chapels are usually termed donatives, (*i. e.*) when it can be conferred by the mere gift or disposal of the patron, and subjected to his visitation only, and not to that of the ordinary. It vests absolutely in the clerk by the patron's deed of donation, without presentation, institution, or induction, (3 *Stephens, Com.* 82). When the King founds a Church, hospital, or Chapel, and exempts it from the jurisdiction of the ordinary, it shall be a donative, and that without express words of exemption. So also when the King grants a license to a subject to build a Chapel, to be exempt from the jurisdiction of the ordinary.

Donative what.

Chapel, &c. founded by the King.

Generally speaking, where a donative has not presentation and institution, it has not a *curam animarum*, and therefore is it that the incumbent need only have the donation of the patron; but he should be *infra sacros ordines*, for his function is spiritual; he must be twenty-three years old, and in deacon's orders, and subscribe

Donatives, attributes of.

Minister.

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and read, &c., as for any other benefice; though he need not prove the performance of such duties. He may be cited to take a license from the bishop, and a prohibition does not go, though it is not necessary that he should have a license to preach or to perform the ordinance of matrimony.

Citation to take bishop's license.

In cases where the Church is parochial, and the patron refuses to make a donation, the ordinary may compel him; for though the Church is exempt, he is not: if he presents by simony, it is within the statute, 31 Eliz. c. 6. If on the death of the patron, a donative is void, the presentation descends to the heir; if it were presentative, the executor would have title.

Donative Parochial Church.

Death of patron of donative presentation, in whom.

The patron and not the ordinary visits the donatives; if the King be patron, he visits by his Chancellor. If a subject be patron, he visits by commissioners: so also the patron shall solely inquire of the reparation and of the ornaments, and if the bishop intermeddles, a prohibition will go; so also deprivation is by the patron, for heresy and other offences.

Visitor.

Reparation and ornaments.

Deprivation of minister.

A lapse does not occur for want of presentation if it be not specially provided in the foundation, and if the incumbent be disturbed, the patron shall have a *quare impedit* and count upon the special matter. If it be doubted whether it be a donative or a presentative, and any one sues for induction, a prohibition does not go; for until induction, the incumbent has

Lapse for non-presentment.

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no remedy to try the right; if it be a donative, the induction is null. If the incumbent resigns his Church, it must be to the patron; and when in the words of the donation as of his Church, the whole of the property is devested out of him without further ceremony. If there be two patrons, resignation to one with assent of the other is sufficient, (*Com. Dig.* "*Donative*," (A)). A presentation by a stranger and admission and institution thereupon does not make the Chapel presentative; but if the presentation be by the patron, it for ever after shall be presentative, (3 *Stephen's Com.* 83: *Gib. Cod.* 236, *S. P.*).

Resignation by incumbent.

Two patrons.

Presentation, effect of.

Formerly all bishopricks were donative, by the delivery of the crozier and the ring, and were so until the 17th of John; prebends and chantries may be donative, (*Com. Dig.* "*Donative*" (A)); nearly similar to a donative is the manner of becoming a perpetual curate, for it requires neither presentation, institution, or induction; but before the perpetual curate can legally officiate, he must obtain the license of the bishop (*Stephen's Com.* 81). The Churches wherein perpetual curates exist, were, for some reason, exempted from the stat. of Henry 4, c. 12; and the impropriator is bound to provide some person in holy orders to do the duty, and to pay him a proper remuneration for his services, (*Stephen's Com.* 75, *et seq.*), such ministers are those which are termed perpetual curates, and a

Perpetual curate, similarity to a donative.

Exemption of certain Churches from stat. Hen. 4.

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Chapel having a perpetual curate, may, in some instances, prescribe as against the mother Church for tithes, (*Gib. Cod.* 235).

Chapel of Ease.

A Chapel of Ease is a place of worship, which is built for the ease of those parishioners who dwell far from the parochial or mother Church, it is for their ease and convenience in prayer and preaching only, (*Gib. Cod.* 235), for the sacraments should be performed at the mother Church, (*Ib.* p. 30). Here, generally, the curate is removable at the pleasure of the rector or vicar; but a Chapel of Ease may be parochial also, and have a right to sacraments and burials, and to a distinct minister by custom, though subject in some respects to the mother Church, (*Ib. et seq.*).

Brereton v. *Tamberlane, temp. Hardw. July,* 1752, 2 *Ves. sen.* 425]. It belongs to the jurisdiction of this Court (Chancery) to establish the right of nomination and election at large to a chapelry or curacy, a Chapel having all sorts of parochial rights belonging to it, as clerk, warden, and of the right of performing all the divers and several rights of baptisms and sepulchre is a strong evidence to prove it is not a bare Chapel of Ease to the parish to which it belongs, but stands upon its own foundation, (*Ib.* 427), for two parishes may unite, one may continue a parochial Chapel to which the old rights may be appendant, (*Ib.* 427).

Two parishes uniting.

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Chapel having parochial rights.

Com. Dig. "*Eaglise*," (D)]. If a chapel has parochial rights as clerk, wardens, &c., rights of divine service as baptism, &c., and the inhabitants have a right to them there, and not elsewhere, and the curate has small tithes and surplice fees, and an augmentation, it is a perpetual curacy, and the curate is not removable at pleasure.

So it is said to be a Church built within the precinct of a parish Church, to which burial and sacraments are incidents, belongs to the parish Church and the parson of it, and he ought to find a chaplain for a Chapel of Ease within his precinct, or officiate there himself, (*Ib.*).

Repairs of Chapels.

Degge, P. C. 187]. In the case of new Chapels it is a question whether the ordinary can compel the inhabitants to repair the same, but where a number have joined to build a Chapel, and procure for it consecration, which was the original manner of erecting Churches (*supra*, p. 3), it would seem reasonable that the bishop should have the same power to compel the repairs and to visit it. If the greater part of the inhabitants of the chapelry agree to repair it, and give the collector a right to distrain for rates, the majority shall bind the rest, (*Ib. et seq.*; *vide infra*).

A Chapel which has a font and a burying-place is judged in law a Church, (3 *Inst.* 363).

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Tattworth v. *The Bishop of Chester*, 4 *B. & C.* 568, *Abbott*, C. J.]. But where a Chapel of Ease has been erected within legal memory, the incumbent of the mother Church is entitled to the nomination of the minister, unless there has been a special agreement to the contrary (*supra*, p. 8), to which the parson, the patron and the ordinary are parties, and no person can be authorized to preach publicly in a Chapel to which all the inhabitants of a district have a right to resort without the consent of the clergyman to whom the cure of souls is given, (*Sed vide*, 1 & 2 *Vict. c.* 107, *s.* 7).

Consent of incumbent to preach in Chapel.

A private Chapel is, when it is appended to the house of a nobleman, or it may be built by a man for himself and two or three neighbours, in which cases the incumbent of the parish has no power to present to it or maintain a chaplain therein, (4 *B. & C.* 568).

Private Chapels.

Chapels erected upon condition are not to prejudice the mother Church, and the chaplain shall account for the oblations on pain of suspension, (*Gib. Cod.* 335).

Chapels erected upon condition.

Proprietary chapels are so called because they are the property of private persons, who have purchased or erected them with a view to profit or otherwise, (3 *Stephen's Com.* 152).

Proprietary Chapels.

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Hawkins and Coleman v. *Compeigne*, 3 *Phil.* 16]. A Chapel was built and consecrated in A. D. 1696, the pews were personal property, and only the owners of the pews or parties who had an interest or property in the said Chapel had any right therein; that all the disbursements, as the repairs, &c., had been paid for by a general rate on the owners of the pews in proportion to the value of the pews as agreed, upon the building of the Chapel; that certain repairs were necessary to the Chapel, and the churchwardens convened a vestry, and laid out money for repairs as ordered by the vestry; a subsequent vestry ordered a rate for the payment. The suit was to compel the payment of the rate. "By the general law, the repairs are to be done by the land-owners of a parish or chapelry. It is not ancient, for it was built in 1696. Pews being personal property is contrary to the law, the ordinary may grant a particular pew during residence, or there may be a prescription, the allegation of usage must be ancient: but here the time the Chapel was built is alleged. To establish a distinction the conditions of the consecration must be stated, and how the usage was established, or it must fall under the general law. For the Ecclesiastical Court to support contribution it must be shown to be legally laid."

Pews personal property.

General rule of law, how changed.

Parliament only can change the general law. (*Gib. Cod.* 235, *S. P.*; 1 *Add. Eccl. Rep.* 29).

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The repairs of a Chapel are to be done by a rate on the land-owners, and as in the case of a Church may be enforced by ecclesiastical censure, but such repairs are no discharge for those of the mother Church. Repairs of the Chapel.

Moysey v. *Hilcoat*, 2 *Hagg. Eccl. Rep.* 44]. Previously to A. D. 1735, a Chapel was built by twelve individuals, and they agreed to allow the rector of the parish wherein the Chapel was situated 40*l.* a-year to officiate therein, and as proprietors they considered themselves entitled to let the pews. They paid the rector and clerk, and then divided the profits. Proprietary Chapel.

"A license to preach does not infer consecration, but is rather adverse to the inference, for if it were consecrated the rector could preach therein without license; on consecration, notice would be entered, and found in the bishop's register, which would show endowment, if any, and the other terms on which the Chapel was set up, (*Ib.* 46). If no such right was granted, the Chapel is known only as a proprietary Chapel, which is an anomaly and unknown to our Church and to the ecclesiastical establishment; it can exercise no parochial rights, and which, if exercised, would be mere usurpations; the license may be to preach, to administer the sacrament, and to perform all the offices of religion according to the forms of the book of the Common Prayer. (*Ib.* 47). *Primâ facie* all

License to preach.

Arguments against consecration.

Proprietary Chapel, what, in law.

License for, what.

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parochial duties belong to the incumbent of the parish, and the fees, &c., belong to him, and such rights, can only be granted to the Chapel by composition, with consent of the patron, incumbent, and ordinary, (*Ib.* 48), the consent of each being necessary, as each has an interest, and it has been held the consent of all would, perhaps, be insufficient, without compensation to future incumbents, which compensation and endowment would be recited in consecration act, (*Ib.* 49). If the proprietors cannot, from any cause, let these pews, what is there to prevent them, though the Chapel be consecrated, from shutting it up, if it be not consecrated, to convert it to any secular purpose. If a Chapel exists from time immemorial, and the performances of the offices of baptism, matrimony and burial, is not otherwise accounted for, it might be presumed there was originally a composition. The license is to a rector and his successors, and he being ignorant of the law might think it better to lay dead bodies under the Chapel, than (if not consecrated) to devote the vaults to another purpose, but it would not affect the rights of future incumbents. The payment for the use of the vaults was receivable by the proprietors, and the fees were accounted for to the rector; assessment of a building to the parish rates is an argument against consecration. (*Ib.* 51). Chapels without authority lawfully given cannot keep separate registers, for they would

Rights, how granted.

Right to shut up.

Conversion to secular purpose.

Chapel, immemorial existence of, how accounted for.

License by rector to bury, effect.

Assessment of building, effect.

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not be receivable in evidence, (*Ib.* 52). Patrons or proprietors forming a joint-stock company cannot appropriate a part of the Church dues," (*Ib.* 53, Sir *J. Nicholl.*)

Keeping separate registers.

Hodgson v. *Dillon*, 2 *Curteis*, 388]. A license is granted to A. as the minister of a proprietary Chapel, authorizing him to perform all the duties belonging to that office. I know not of what functions, according to the law of the Church of England, the appointment of a minister to an unconsecrated Chapel, confers, or of the ecclesiastical duties belonging thereto; there is here no reservation, it is a simple license. The law of the Church of England stands as follows:—No clergyman has a right to officiate in any diocese, unless he has lawful authority, which he can only receive of the bishop, it may be by institution, as in the case of a benefice, or a license, when the clergyman is to officiate as a stipendiary curate, (*Ib.* 292). The ancient canon law knew nothing of proprietary Chapels or unconsecrated Chapels, the necessities of the times gave rise to the creation of Chapels of this kind, and the licensing ministers to perform duties therein. The license of the bishop on such occasions emanates from episcopal authority, but it could not be without the consent of the rector, or of the vicar. They who assert it is in the power of the bishop to confer a permanent right as against himself, must show that such

License of a minister to Proprietary Chapel.

License, what.

Proprietary Chapels, not known to the canon law.

Consent of incumbent necessary.

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power has been conferred by the ecclesiastical law. It is not in the power of the bishop to estop himself, and he is bound according to the exigencies of the case to revoke such license if the good of the Church requires it."

Power of bishop to revoke license.

Bequest to repair free Chapel.

A bequest of 200*l.* to repair a free Chapel was held good, because it was only to support that which at the time of the will was in mortmain, (*Ambl.* 651; 2 *Burn's Eccl. Law*, 556, *S. C.*).

Augmented curacy;

Prout v. *Cresswell*, 1 *Lee*, 38]. The bishop has power to sequestrate an augmented curacy, for it was by the 1 Geo. 1, c. 10, put in many respects on the same footing with presentative livings.

and Churches.

Augmented Churches and Chapels shall be considered in law as a benefice, and the license is to operate in the same manner as institution or induction, 36 Geo. 3, c. 83, s. 3 (*a*), which it was intended should, and did, bring them under the provisions contained in the 21 Henry 8, c. 13,

(*a*) The term benefice comes to us from the old Romans, who used to distribute the land of the conquered amongst their soldiers, and those who enjoyed such reward were called *beneficiarii*, and the lands *beneficii*, hence came the word as applied to Church livings, for the ecclesiastics held for life like the soldiers, and the riches of the Church arose from the beneficence of princes; but Mr. Fraser says the word has rather a feudal signification, and means a grant of land for a limited time by a lord to his vassal for his maintenance, (1 *Burn's Ecc. Law*, 135, *et seq.*).

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whereby acceptance of a benefice, unless by express license, incurred the forfeiture of those held previously, which statute is now repealed by the 1 & 2 Vict. c. 106, and which in some degree ameliorates the stringency of the former statute, and excepts certain cases from its operation.

Augmentation by Queen Anne's Bounty.

1st Geo. 1, c. 10, s. 4. The benefit is to extend not only to such persons, &c. &c., who come in by induction and institution, but to those also who come in by donation, or who are only *stipendiary* preachers or curates officiating in any Church or Chapel *wherein the Litany* and *the rights* of the Church are used, most of which, not being corporations, cannot take a grant of the augmentation, all such Churches and Chapels (by reason of the advantage which the patrons might possibly take) which shall be hereafter augmented are declared and established from such time to be *perpetual curacies* and benefices, and the ministers and their successors shall henceforth in law be considered as corporations, and be able to take in perpetuity all lands which shall be purchased by the commissioners of Queen Anne's Bounty, and that the impropriators, patrons, their heirs and rectors, and vicars of the mother Church, whereunto such Chapel doth appertain shall be utterly excluded from *having directly* or *indirectly* any interest, profit, or benefit, by such augmentation, and shall continue to allow the minister, as by ancient custom, or of right, *not bounty*, as should

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be paid before, and which they by law might be compelled to pay, such sum and bounty (augmentation) shall be vested in the minister and his successors.

Cure of souls not discharged by augmentation.

Sec. 5. Those who have the cure of souls are not to be discharged therefrom, and all rights of the rectors or vicars as to dues to continue.

To be subjected to lapse.

Sec. 6. Such augmented cures to be subjected to lapse.

Subject to the visitation of the ordinary.

Sec. 14. And though they were before exempt they shall be subjected to the visitation of the ordinary.

Augmentation not to be without consent of patron.

Sec. 15. No donative shall be augmented without the consent of the patron in writing under his hand and seal.

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PROPRIETARY CHAPELS.

Seats, when not under the common law.

Of all the various denominations of Chapels above enumerated, those alone of a proprietary nature, it is conceived, are severed from the general usage, or common law.

Probable origin of donatives.

Free Chapels were erected by the license of the King, for the purposes of public worship; and may have arisen from the exertion of the Royal prerogative, in attempting to humble the pride of some haughty Ecclesiastic: by showing him the Sovereign had still sufficient power to create places of worship, independent of his jurisdiction, and which power it might have been very necessary to exert during the middle ages, in which period history is filled with the account of struggles between the Crown, and the Church, arising either from the exercise of a right, or the usurpation of a privilege. The statute conferring the free Chapels upon the King, is silent as to their origin.

Chapels of ease, origin of.

Chapels of Ease, are, as the name imports, the institutions of necessity, and were either built by public subscription, general assessment: or, which was more usual, by some pious person for the advantage of his fellow parishioners; or it might have been in accordance with some superstitious vow. In those times, the rapacious

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spirit which is manifested in these days, was unknown, or, at least, unpractised, by the lay community in spiritual things: for they were deemed to be sacred objects, and unfit for the purposes of trade and traffic. These erections, whether prompted by necessity, or devotion, were dedicated to the public worship of God, and resorted to by all the parishioners in common, and hence the Chapels of Ease (in the strict sense of the word).

Origin of Proprietary Chapels.

In the progress of time, the spirit of enterprise was awakened, and commercial acuteness aroused, it was then men began to traffic in the religious wants of their fellows, and Proprietary Chapels were instituted; a name formerly unknown to the Canon law, and to the Ecclesiastical establishment. These were buildings reared by the speculations of private individuals, who obtained a license (in some cases Consecration) from the bishop, that the Church service might be used therein, and by agreement with the incumbent of the parish, either appointed him to preach, or paid some other minister of the Church of England, by his permission, to do that duty.

The pews were apportioned among the speculators, who let them at a rent that the minister might be paid, and they receive a profit. Such then was the origin of Proprietary Chapels, and it was necessity only which allowed their institution, for population had increased without a corresponding accommodation. In these Chapels

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(and others to be spoken of hereafter, which are built in accordance with the express enactments of Parliament), the common law does not take effect; for therein the sittings may be let at a rental, in the same way as the proprietors might let a house or a room, but it does not follow because such Chapels on their first creation were proprietary, that they should always continue so, for such rights may be lost, and the buildings come under the denomination of Chapels of Ease.

Common law where ousted.

It is considered abstaining from the exercise of the right of receiving rent for the pews allotted would, in time, devest the proprietors of any power in the Chapel, as, in the case of non-user for twenty years, and the parishioners repairing, appointing Chapelwardens, and doing other acts of ownership, unless by express grant, upon condition, or otherwise.

Prescription, application of, to Proprietary Chapels.

The user and repair, in the absence of a permission, would be considered adverse, and that, though in some instances rent was paid, for it would be considered rather as an exception against the legal right than the general rule.

In *Watson's Clergyman's Law*, p. 712, it is said, "if a layman, on the dissolution of the religious houses, had a Monastery, of which a Church is parcel, and for sixty years (the then prescription), the parishioners come and use it as the parish Church, it shall give jurisdiction to the ordinary, to dispose of the seats, because by

Church gained by prescription.

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constant usage and sufferance, it has become a parish Church, though before, it was not subject to the visitation of the ordinary; but if the patron had placed any persons in the seats, the ordinary could not dispossess them, because he hath all the time used his right;" which is a case exactly in point with that in discussion, and they who paid the rent would be deemed to be those who were the appointee's of the original proprietors, which would account for the departure from the general rule, and over the other part of the Chapel, as in the case of the Church, the ordinary would have the power of appointment, more especially if the Chapelwardens had unresistedly appointed persons to seats, for they are only the servants of the ordinary. In *Hawkins* and *Coleman* v. *Compeigne, supra*, p. 122, it was pleaded, that they who occupied the pews paid for the repairs according to the respective value of their holdings. It was held, the usage could not be as laid, because the year of the erection was shown not to be ancient, and to establish a distinction, the condition of the consecration must be shown (the Chapel did not appear to be rated to the parish, so the consecration was presumed), or it must fall under the general law. In such a case, the pews might be appurtenant to houses by faculty.

Proprietary Chapel, when appointment vests in ordinary.

It is apprehended, where the seats in a Chapel were once appropriated in a peculiar manner, and the right is lost, that then the common

law right immediately vests, and the seats in such Chapels assimilate to those in the chancel of a Church or an aisle, in both of which the ordinary had no power of appointment, and yet we find that on the loss of the rights of those who were entitled by prescription to the seats: the ordinary had the power of appointment, not only through the medium of the Churchwardens, but in exclusive appropriation by faculty.

The building of the chancel would be coeval with the Church, and, therefore, as ancient as the nave; not so the aisles, which might have been erected (comparatively) but recently; at all events, in such time that the date of the erection might be known, and are, in few instances, if in any, as ancient as the structure of the Church. If the building be not ancient, whether it be forty or a hundred years, its estimation in law would be the same, and if any certainty as to its date could be arrived at, it would take it out of a prescription (unless it be a time beyond that of strict legal memory), and in such a view an aisle is exactly similar to a proprietary Chapel, which by some means has become the common property of the parish. The ordinary in an aisle (in similar circumstances), may appoint a parishioner to a seat, or grant a faculty; why should he not have the like power in the case of a once proprietary Chapel? An aisle is built on the freehold of the parson, a Chapel is not; yet on becoming annexed to the parish as com-

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mon property, the soil whereon it is built vests in the parson, for he has the spiritual cure of the parish.

Where a proprietary Chapel is consecrated, unless in the deed of consecration, a special right is reserved to the speculators, it is presumed the fee of the soil vests in the parson, and he only would be entitled to the burial fees, as he is, in all such cases, entitled to the customary surplice fees, (*supra*, p. 123).

Proprietary Chapel, augmented, effect of.

So, it is apprehended, a proprietary Chapel, though the proprietors were engaged in the full exercise of their speculation, repairing, letting, and bearing all the expenses of the establishment: if they, from ignorance of the effect of the statute of the 1 Geo. 1, c. 10, or from the supposition of a benefit to themselves, allowed the minister's salary to be augmented from the Queen Anne's Bounty Fund, from that moment their rights, and privileges would cease; and though they held the land and Chapel in fee, it would, by the effect of the statute, immediately vest in the minister; as far as the freehold was concerned, for the benefit of himself and successors, and the pews would become common to the inhabitants of the Chapelry or parish, and be in the disposition of the ordinary, for every man is supposed to know the law, and it would act as an appointment under the Statute of Mortmain. The augmentation could only be conferred by the consent of the patron, in which light, it is

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conceived, the proprietors would be held (*vide supra*, p. 127); if the consent was without reservation, it would take effect as above, and the Chapel would become a benefice, and a perpetual curacy.

Construction 1 Geo. 1, c. 10, s. 4.

It would be difficult to understand the section in any other way, for the express words of the enactment are, "that the impropriators, patrons, and their heirs, and the rectors and vicars of the mother Church, whereunto such Chapel doth appertain, shall be *utterly excluded* from having *directly* or *indirectly*, any interest, property, or *benefit* by such augmentation:" and if any other construction than that contended for above can be allowed, how could the words of the statute take effect; for it is presumed that the words "*directly*, or *indirectly*," were inserted to exclude even the *colour* of profit, and if the proprietors were still allowed to hold the property as heretofore: would it not be a premium conferred upon them for the purpose of letting their pews? To do an act in direct contradiction to the polity of the common law? Would it not enable them to get greater talent to fill their pulpit, by their being enabled to offer a higher salary to the minister than they hitherto had? and by trafficking in his talent, to fill their pews, and thereby reaping a greater advantage; such must be allowed would be the effect, and if so; would it not be in positive opposition to the very express words of the statute?

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Augmentation bargain and sale, effect.

If on the augmentation, the matter was made one of express bargain, it would then be governed by very different considerations. The curate's salary, independently of the augmentation, would be secured upon the pew rents (as is the customary appointment in the statutes for building new Churches), and, besides, a part of the pews would be set aside as free seats, to accommodate the poorer parishioners.

Augmentation without reservation.

And as in connection with pews (as well as with other matters), it is a rule of law that the benefit and the burden should go together; it would necessarily follow, if the Chapelry was augmented without reservation on the part of the proprietors, they would not be compelled to pay the minister the salary they had paid before; besides, the permission for augmentation might be considered as an act of abandonment of the property to the general use, and to the wants of the parish, throwing upon them the onus of repair, &c., as well as the benefit in the increased accommodation which it would in common afford to all the parishioners.

Proprietary Chapel, licensed, effect of the augmentation.

Stipendiary preachers.

Whether the Chapel was consecrated, or only licensed, for the purpose of the exercise of the ordinances of religion, according to the established forms of the Church of England, the statute, it is apprehended, would still take effect; for *stipendiary preachers* are expressly named in the fourth section, and which, in a great degree, appears to direct this particular disposition.

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By the sixth section, it is said, all augmented Churches or Chapels shall be subjected to lapse, and (*supra*, p. 128), we have seen they have been judged liable to sequestration; and by the 36 Geo. 3, c. 36, s. 3, it is said, they shall be considered in law; as benefices presentable. So the augmentation, if it had any effect at all, would convert the licensed Chapel into a benefice, presentable, and the minister into a corporation sole. And the same act (*i. e.* the augmentation), if without reservation, would vest the Chapel in the parish generally, for the purposes of public worship; the dedication, by that act, to the parish would be perfected, and, it is considered, could never more be devested.

Bishop, right to impose terms on consecrating Chapel.

If the building had not been consecrated; or, if there was a doubt, (no certificate thereof appearing in the bishop's register; supposing consecration to be a necessary act. In the legal institution of a Chapel): it is considered, that the bishop on attending for that purpose, could not impose terms upon the parishioners in contradistinction to those, which they acquired, when the proprietors assented to the augmentation; or in other words, the bishop could not by the deed of consecration set apart certain pews for free seats, and impose a rent upon the remainder for the purpose of paying the minister an additional sum, besides that acquired by the augmentation. It is conceived, the only power the bishop would have in the disposition of the seats, would be in

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his character of ordinary, and which power must be exercised in strict accordance with the common law right which is resident in every parishioner.

Consecration, effect of.

The building is a Chapel in the strict sense of the word before the consecration, and it does not change the thing, but only appropriates it to an exclusive use, an effect it is presumed which the statute also produces.

Stipendiary preachers, construction of statute.

The statute specially mentions, and without qualification, "stipendiary preachers," which words must have been intended to include all ministers whose salary was dependent; and as in the days when this act was passed, proprietary Chapels were known, it is presumed, if they were to be excluded they would have been expressly named; and when general words are used in a beneficiary statute, all persons would be included who could be brought within the definition, regard being had to its obvious intendment, which was the augmentation of the salaries of the poorer ministers of the Church of England, whether beneficed or stipendiary; not the exaltation and elevation of benefices, but the improvement of the condition of the *working* clergy (*b*).

Licensed Chapel,

A licensed Chapel comes within the exact

(*b*) Dissenting ministers could not be included within the meaning of "stipendiary preachers," though it be a word of very large signification, because the statute was passed for an express purpose, and by no effort of reasoning could they be included in its intendment.

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definition of a Chapel of Ease. The only presumption for its being licensed is the want of Church-room, and it is, therefore, in ease of the mother Church, and is under the superintendence of the incumbent of the parish, for no one could officiate therein without his permission. If then it is a Chapel in ease of the Church, it must be clearly within the definition of the act, and though by immemorial custom it may not be annexed to the mother Church, still during the time of its being licensed (if consecrated, there could be no doubt) it is under the immediate superintendence of the incumbent, and it is by his permission; the minister is enabled to officiate, (if licensed); yet he is not deprived of his right, for the cure of souls is still with him: and, if he hath the direction of the minister, which (in one sense) he has, for if any improper, or heretical doctrine was preached in the Chapel; under the cloak of the ritual of the Church of England, he could revoke his permission, and the minister would be compelled to withdraw: if he resisted, by libel, by citation, or by a criminal proceeding in the Ecclesiastical Court. Therefore the minister is under his direction, and may be viewed in the nature of an assistant: and with great consistency. In fact it must be said, that during the time of the license and permission of the incumbent, that Chapel doth appertain to the rectory or vicarage.

similarly to Chapel of Ease.

Cure of souls in Chapel.

Though the effect of the license is to sever it

Effect of

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licensing a Chapel.

from secular things only during the time it is appropriated for the purposes of public worship according to the ritual of the Church of England. The statute would in effect be a perpetuation of the license, for by it the freehold is vested in the minister, and by such vesting he becomes a corporation sole.

Statute, perpetuation of license.

Impropriator and patron, construction.

It may perhaps be objected that the words, "impropriator and patron," are not sufficiently large to include proprietors, in which case it would apply to the Chapel, though consecrated. A merely licensed Chapel might again be appropriated to secular things, but the building if once consecrated would for ever be set apart and could only be devoted to the purposes of religion (*supra*, p. 124); therefore if the objection suggested has any power, it would act as a preventive to the operation of the statute, and prevent the augmentation of any minister's salary who was officiating in a Chapel which had been once proprietary. But such is not its operation; and on application at the Queen Anne's Bounty Office, it will be found that many Chapels which were once proprietary are now, through being augmented, termed Chapels of Ease and perpetual curacies.

Consecration, effect in common with the statute.

It is not laid down in any of the authorities within reach and which have been consulted, that consecration by the bishop is absolutely necessary for the purpose of creating a benefice, though doubtless it has always been the custom; and it

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is therefore contended, that the act would have the same effect on a licensed building, as the deed of consecration; for in both cases it would be an appropriation of a thing for a special purpose, in the one case by express direction, and in the other by implication.

Intention of the statute 1 Geo. 1, c. 10.

The intention of the statute of 1 Geo. 1, c. 10, was to extend as widely as possible the advantages of the late Queen's beneficence, and the policy of the act was the enlargement of the powers of the Bounty commissioners, rather than their restriction; and the intendment to benefit all officiating clergymen who in their appointments were inadequately provided for.

Stipendiary minister of Proprietary Chapel, what.

The stipendiary minister of a licensed proprietary Chapel is as much a clergyman of the Established Church as though he was presented to a benefice, and his case is precisely parallel to that of a curate appointed by the incumbent of a parish to a district Chapel, and their positions are exactly similar to that of the vicars of the appropriated benefices before the statutes of the 14 Edw. 3, c. 17, and the 15 Ric. 2. The policy of the statute of the 1 Geo. 1, c. 10, is in effect the same, (*i. e.*) to make the appointment of the curate permanent, and for the prevention of caprice in the removal of a minister from a Church, wherein he had doubtless become intimate and identical with the spiritual interests of the congregation, and also that the Church should be properly filled—which latter reason

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would apply with twofold force to the case of the minister of the proprietary Chapel.

Statute of Mortmain, application of.

It may also be objected that the various Statutes of Mortmain would take effect upon the grant, if the implication be as above insisted on. If it were considered to be an alienation in mortmain, it would be one of which the Crown only could take advantage, and which under the circumstances would be re-granted for the purposes of the alienation; but in the case of the augmentation of poor livings, there is an express proviso in several statutes, "29 Car. 2, c. 8, since extended by 1 & 2 Wm. 4, c. 45, and the 1 & 2 Vict. c. 107, and 3 & 4 Vict. c. 3, s. 76, that augmentations of poor livings may be made in such manner as is therein provided, free from the restrictions of the Statutes of Mortmain; and upon the same principles, provisions have been likewise made relaxing the laws of mortmain in favour of the governors of Queen Anne's Bounty, 2 & 3 Anne, c. 11; 43 Geo. 3, c. 107; 2 & 3 Vict. c. 49; 3 & 4 Vict. c. 20, s. 5," (1 *Stephen's Com.* 427, *et seq.*), even if it were not excepted by the acts above mentioned, it is conceived, it still would be within the spirit of many of the late statutes for building Churches and Chapels; for it would be an absolute disherison of the lands from the estates of the proprietors, and an immediate vesting for the purposes of religious uses.

Proprietary Chapels.

The case supposed, is one which is, perhaps,

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scarcely likely ever to occur, yet still it is within the range of possibility, and would fairly serve as a channel for the conduction of the argument, whereby the principles which could be brought to bear on the like complexion of the case, would be elicited. The proprietors are supposed to be seised in fee of the Chapel and land: because, thereby the matter is simplified; if the proprietors were merely lessees of the building, in such case, there could be no augmentation: because, the consent of the superior landlord would be wanting, who only could be regarded as (or stand in the place of) the patron, and which would be necessary before the augmentation grant could take effect.

wherein statute likely to take effect.

The proprietary Chapels which are most likely to be subjected to the operation of this statute, are such as have been for a long time past in the hands of the parishioners, and though there may be a tradition relating to the time and terms upon which the Chapel was built, yet there may be no record of the consecration, if any ever existed, or if the ceremony was ever performed; for it may be, the consecration was presumed by the user, and the building, on its general adoption by the parish, or by a particular part of it, for the purpose of Church service, ceased to be rated in the parish books, and such would be taken, in absence of anything to the contrary, as an evidence of consecration, though, perhaps,

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originally, it was a mere licensed building, and had never been consecrated.

Claim of pew, after Chapel has vested in parish.

The tradition of its first vesting in the parishioners, may be lost, and the memory of the terms on which the Chapel was built, only kept alive by some individuals claiming pews, and, however illegally, making the same a matter of bargain and sale; for whatever were the terms of its first user by the parish, or however it became vested in the parishioners, for the purposes of public worship, whether by consent or sufferance, which had grown into an absolute right. On such vesting, the common law right would apply, and nothing short of a faculty would have the effect of giving a parishioner an exclusive right to a pew or sitting; for if the time of its appropriation was known, it would be against any presumption of "time beyond whereof, &c.;" and, therefore, a prescriptive right could not apply. On its vesting in the parish, the right of seating the parishioners would, it is presumed, be in the ordinary; and however long, or on whatever pretence, an individual claimed an exclusive right: in the absence of a faculty, it would be supposed the appointment to the seat was conferred by the ordinary, and its continued occupation, was by his sufferance; from the supposition that the wants of the person were adequate to the accommodation it afforded. Therefore it could never have been adverse to him, and, consequently, could not vest in the claimant.

Right of the ordinary.

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Donatives, likeness to Proprietary Chapels, vested in parishioners.

Free Chapels or Donatives may, in some particulars, be likened to Proprietary Chapels, which have become vested in the parishioners; excepting in such vesting they would be subjected to the visitation of the ordinary. It is supposed they were created by the exertion of the absolute will of the sovereign, his license being sufficient; and as it is said (*Gib. Cod.* 235), built generally on his lands, to serve him for a place of worship when he resorted there. They are also known to exist on land which never was in the possession of the sovereign, and, therefore the building must have been the effect of his mere license. It is more than likely they were never consecrated: and if the supposition above (*supra*, p. 129), is correct; the most reasonable conclusion would be, that they were not. If the king's license is sufficient, there could be no need of consecration; besides, if they were consecrated, it is more than likely the bishop would reserve to himself the power of visitation, which we find is expressly in the patron (*supra*, p. 116), for consecration is a ministerial act, as well as an act of spiritual appropriation. Yet we find these Chapels are subject to augmentation: and to become perpetual curacies and benefices; which, as it is contended, would be the effect of the augmentation upon proprietary Chapels, and greatly favour the argument adduced in support of the position above advanced, (*supra*, p. 130, *et seq.*).

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Proprietary Chapels (in the absence of an express enactment), may be said to be the only places of public worship wherein the common law doth not take effect.

New Churches.

It will be necessary shortly to notice the several statutes relating to New Churches; wherein, necessity has compelled a departure from the rules of the common law.

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PEWS IN NEW CHURCHES.

58 Geo. 3, c. 45, ss. 18, 19, 20 (*a*). Churches built in accordance with this Act, are, during the life of the incumbent, to be perpetual curacies, and subject to him; on his decease, the proposed division, as directed by the Act is to be carried out. **Perpetual curacies.**

Sec. 75. Before the consecration of a Church or Chapel, built under the direction of this Act, a pew capable of containing six persons, in the body of the Church, and on the ground floor, contiguous to or near to the pulpit, is to be set apart for the use of the minister and his family; and others, not among the free seats, to the number of four, for his servants; and besides a certain portion of the Church is to be set apart for free seats. **Pew for minister and family.**

Sec. 76. Subscribers towards the building of a new Church, are to make choice of the pews therein, in the order of the amount of their several subscriptions. **Choice of pews by subscribers.**

Sec. 77. Gives power to let the pews, reserving rent, to be payable quarterly. **Letting pews, reserving rent.**

Sec. 78. Gives power to alter the pew rent, with consent, &c. **To alter pew rent.**

Sec. 79. In the event of the rent being be- **Right of entry in**

(*a*) See Appendix, for the sections of the Statutes at length relating to pews.

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church-wardens, on non-payment of reserved rent.

hind in payment three months, and a notice in writing demanding payment, having been given, the churchwardens may enter upon such seat, and let it to another, until the rent in arrear and the costs be satisfied, or are empowered to *sell the same by auction, since repealed* by the 59 Geo. 3, c. 134, s. 25.

59 of Geo. 3, c. 134, in aid of the above.

Letting to parishioners.

Sec. 32. The seats, or pews, are to be let only to the parishioners, so long as they continue inhabitants of the parish; every pew to be subjected to forfeiture by non-payment of the rent;

Letting not to be by auction.

the sale, or letting, of the pews, to be by private contract, and not by auction.

Appropriation for a term, and right of assignment.

Sec. 33. Subscribers towards the building of the Church may be discharged from the payment of the pew rent, for a term, or for life; wholly, or in part, in such a way as the commissioners may see fit, and they may allow the subscriber, if he removes from the parish, to assign the remainder of his term over to another parishioner.

Rebuilding or enlarging Church.—Faculty, &c. rights.

Sec. 40. Where a Church is taken down and enlarged under the provisions of this Act, those who enjoy pews or sittings in the Church, by reason of a faculty or a prescription, shall have a pew or pews allotted to them as nearly in the same situation, and of the like dimensions in the new Church.

3 Geo. 4, c. 72, declaratory of the above.

Transfer of faculty right from old to new Church.

Sec. 23. With the consent of the owners of the pews, (*i. e.* by faculty or by prescription) the

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commissioners may transfer any right which they have to the sittings in the old Church or Chapel to the new Church or Chapel, if they reside in the division wherein it is erected: and therein they are to enjoy the same right and title which they had in their old pews, and such rights are to be so directed in the assignment, as in lieu thereof, *without* a faculty. Such assignment shall be registered in the registry of the diocese, and a duplicate thereof be deposited in the chest of the Church, but no larger right is to be gained in the pew of the new Church, than was held in that of the old Church.

Notices for letting pews.

Sec. 24. Contains regulations as to notices for the letting of pews; a list is to be made of those pews which are unlet at the end of the year, and is to be posted upon the Church door, and if they be not let within fourteen days, they may be let to the inhabitants of the adjoining parish, &c., (wherein there is not sufficient pew accommodation), at the rent affixed, for any term not exceeding the end of the year: when such pews shall again be considered as vacant, and inserted as such in the list.

Power to let to inhabitants of adjoining parishes.

Right of acceptancy, how lost.

Sec. 25. In any case where a term for a longer period than a year has been granted to an inhabitant of a parish, or a district, wherein the new Churches are situated, and he shall leave the parish or district, or discontinue his attendance for the space of a year, such pew shall be considered vacant, and may again be let.

1st and 2nd of Wm. 4, c. 38, citing the above Acts.

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Power to let pews to adjoining parishes.

Sec. 4. In Churches built in accordance with these statutes, provides for letting the pews, according to the rates affixed by the trustees, and in event of the pews not being taken within fourteen days from the end of the year, they may be let to the parishioners of the adjoining parishes, wherein there is want of Church room, with as like limitation as is contained in 3 Geo. 4, c. 72, s. 23, (*supra*, p. 149).

Sec. 22, and if the commissioners think fit, all things done under this Act relating to pews may be assimilated to the Acts above recited.

Such are the statutory enactments which interfere with the common right, there are also others of a local nature, applying to a particular Church, in which case also, the statutory enactment is paramount to the common law.

Church-wardens' obedience to the statute law.

Sprey v. *Flood*, 2 *Curteis*, 364.] And if the Act gives power to the churchwardens to do certain things, and they neglect to act in accordance with such direction, they are liable to an indictment for the violation of an Act of Parliament. The statute law is binding upon every Court, and no worse justice is administered, than to depart from the plain and simple words of a statute, (*Ib.* 365).

Statutory provisions.

In examining the various provisions contained in the above recited statutes, it will be found that the rights which they confer are assimilated, as far as may be, to those of the common law. And the Parliament in autho-

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rizing a rent, have been careful that the rights of the poorer parishioners should be preserved, and have therefore directed, that a portion of the Church shall be left unpewed and benches erected for their accommodation, and on which no rent is reserved. It will be remembered that every parishioner has a right to be seated in the parish Church: and therefore this provision.

Payment of rent by common law.

It may be said, that by the common law payment of rent for a pew is illegal, and with truth; yet it may be replied, that Church room was absolutely necessary, and which could only be obtained by private subscription, or a large general tax upon the parish; not only for the erection of the Church; but for the payment of minister and the necessary officials. If then there could be a mode suggested whereby the tax could be avoided, it is conceived such mode must be better than one which would cause ill will in many, perhaps in the largest portion of the parishioners; for it would not be the whole of the parishioners who would benefit by the new building; many being already provided for in the mother Church, and that without a particular cost to themselves; and generally, they who are provided for without cost, are but too apt to forget the wants of their fellow parishioners; and who bear equally the burthen of the repairs with themselves; yet the need of the unprovided for is equal to that of them, whose right is founded upon the claim and the appointment of an earlier date: and was therefore successful.

Provision in the statute to pay rent.

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Provision on death of incumbent.

By the statutes, that part of the parish wherein the new Church is situated is, (on the death of the then incumbent of the parish) for the purposes of the Church to be severed from the other parts of the parish, and the parishioners therein residing are to bear the particular burthen which it imposes, and yet the pews are not exclusively appropriated to them, but are supposed to be for the accommodation of the parishioners generally (*i. e.*) for those already unprovided for in the mother Church. To lighten the burthen upon the parish, a rent is demanded for the pews, and which demand in these particular instances is legalized by statute.

Faculty rights, provision in new Church.

Faculties originated from a feeling of exclusiveness, and so pews are set apart for those who choose to have a particular sitting appropriated to them; the common right is not therefore gone, for the free seats are open to all. The grant of a pew at a rent, it is considered, confers on the renter during the time of the payment of the rent and inhabitancy in the parish, an exclusive right to the use of the pew; and as payment of the rent is the consideration for the allotment, so during the time of non user the right is with the renter and not with the churchwardens to appoint: even in his absence.

Renting a pew, right conferred thereby.

There is a special enactment contained in the statutes above cited, that in pews which have been allotted to a person for a longer period than a year; that removal, or non user for a year shall vacate the right.

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When the pews are let, there is no condition annexed that the person shall occupy, but only that he pays rent; the supposition being that he will use the pew. So, when a person rents a house, there is no condition annexed that he shall occupy, the supposition being that he will occupy: and so long as he pays rent, and prevents any injury to the property, so long would his tenancy enure; unless the landlord gave notice, for the purpose of determining it, and then the tenancy would continue until the expiration of the notice. But the law would not give the landlord possession at a period anterior; nor would non occupancy alone be a sufficient ground for the foundation of an action of ejectment. Houses are intended to be dwelled in: pews for the purpose of conveniently attending the public ordinances of religion: and between the two there is, it is conceived, an exact similarity, regard being had to the particular intendment.

Letting pews, no condition annexed.

If there be a rent reserved, and residence in the parish, such appropriation would, it is conceived, be an exclusive appropriation: to be used, or not used, and it is very doubtful how far the usual declaratory notice, "that seats will not be reserved after the first lesson would apply;" if the letting be in writing, it is most clear it could not, for it is a rule of law, that a parol statement shall not alter a written document; the writing is perfect in itself; the notice is a something extraneous and totally unconnected. If the

Usual declaratory notice, effect of.

Rule of law relating to written agreements.

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letting be by parol, then the renter must at least have notice of the condition to be made available against him. It is doubtful how far such notice posted upon the Church door, or painted within the Church, would be such a notice as could be applied in the nature of a condition; for it is a something beside the letting, and if intended to control it, should be made a part of the agreement. The remarks, (*supra*, p. 66, *et seq.*), cannot be brought at all to bear upon this particular species of pew right; for in such rights as are there discussed, it is expressly said that payment, or even payment of rent, for a pew is illegal and confers no right, but rather militates against its presumption; and as there must be a consideration, the consideration there stated is the only one which can attach. Here the case is essentially different, it is expressly enacted that a rent may be reserved; and the rent must be the consideration, for it is said, "contributors towards the building shall have preference according to the amount of their subscriptions;" thereby putting the question beyond a doubt: then if the rent be the consideration, it must during the period of the letting confer upon the renter an exclusive right, and a right which is independent of the general convenience and the rights of his fellow parishioners—and if it, as it is contended, confers an exclusive right, it would be illegal (unless the letting was on condition), for the churchwardens to place any other persons in the pew, for by possibility the owner or owners

Difference between statutory and common law right.

Churchwarden placing strangers in pews.

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of the pew, or pews might present themselves immediately before the end of the prayers, or in the middle of the sermon; and it is very doubtful the churchwardens having placed some person in the pew, if it would not be considered such an intrusion would be a sufficient ground for an action of trespass: for it would be the hinderance of the enjoyment of a purchased, and positive right.

If A. obstructs B. in entering into his (B.'s) house, B. shall have trespass against A., because during his possession he has the exclusive right. So has the pew renter, and during his absence the churchwardens are only depositees for a special purpose, and that not for the general convenience but for the exclusive right of the renter.

It has been shown (*supra*, p. 65) that the inducement for the ordinary to seat a parishioner, is the necessity he has for attending in the Church during the administration of the offices of the public worship of God, and the right to be seated is conferred by the common law. And as a faculty is a grant upon consideration, the cession of the common law right, as has been shown, is and can be the only consideration. Therefore, the necessity of the parishioner may be said to be the inducement for the grant of a faculty. If, then, the necessity of the parishioner be the inducement for the grant of the faculty, in what position would be the grantee of a faculty pew in the mother Church, if he rents a pew in the district Church? It has been shown each are exclusive grants, the one on condition (a faculty)

Grantee of a faculty pew in mother Church, renting a pew in district Church.

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the other absolute; and in each the consideration is different, the one being the cession of the common law right, the other payment of rent, and each consideration is, in itself, sufficient, and are not, *primâ facie* incompatible.

The possession of the faculty would not, it is clear, make void the pew granted upon a rental, but it is more than doubtful if the pew, which is rented, would not make void the faculty, not voidable, but absolutely void, for there would be no necessity to continue the grant, and as the necessity for attendance at Church is, in a great degree, the foundation of the common law right, so also the necessity of the attendance may be said to be the inducement for the grant of a faculty: if then the consideration fails, what is to support the faculty? It is true the common right which every parishioner possesses to attend the parish Church for the purposes of religion is not extinguished by the renting of a pew in the new Church, for it is only a particular mode of enjoyment, and is supported by a different consideration. During such occupation it may be said to be in abeyance. The new district Church is in ease of the mother Church, and for the parishioners to perform their religious duties; it is not a building common to all the world who choose to pay for a sitting, but it is a building appropriated (with a single exception) to the use of the parishioners, for, if it be not such a vacation of the faculty right as is above suggested; an individual would be exercising a double right

Renting pew, effect on common right.

Renting pew, effect on faculty.

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in the same thing when the law has distinctly defined his necessity to be single, and has confined it to a single occupation.

If there be two particular modes of enjoying the common law right which is inherent in every parishioner, and to a parishioner there has been appointed a special and particular mode of enjoyment, and which he has accepted and used, and afterwards, the other mode of enjoyment being open to him, he applies to be and is admitted to it. Such application and admission would, it is conceived, be held to be an election, and would vacate the prior appointment. And that whether the common law right be in enjoyment by the allotment of the churchwarden or by the special appointment of the ordinary.

Renting pew, vacation of appointment of churchwarden.

It has been shown that a faculty is merely an exclusive mode of enjoying the common law right, and that the renting a pew is not an occupation differing from it, but an election to enjoy it in a particular manner, and if there be such election, and the common law right is still enjoyed, where is the consideration for the faculty?

If other arguments were wanting, it is expressly said above (*supra*, p. 148), that if a parishioner has a faculty right in the old Church, that the commissioner (he being resident in the district) may transfer such faculty right to the new district Church, to be enjoyed in the same manner and in the same degree as the former right.

Faculty right, removal of.

This is not a peremptory, but a permissive as well as a discretionary power in the commissioners,

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for the consent of the faculty owner must be first obtained. If the faculty holder does not choose to accord with the terms of the act, or the commissioners to exercise their discretion, shall it be said, therefore, that he shall have power to enjoy a double accommodation for a single want, and that to the exclusion of others having an equal right with himself? The provision in the statute proves that the intention of the Legislature was to provide for the wants of those parishioners who were unprovided for, and not to enable the wealthy to exclude their poorer or less favoured fellow-parishioners. Therefore, a person having a faculty which he does not choose to transfer to the district Church: or the commissioners to concur, as the case may be, would, it is conceived, be shut out from the district Church, and would not be allowed to rent a pew therein.

It cannot, it is conceived, be said in answer to the above argument that as a faculty is not an exclusive appropriation for user or non-user, that, therefore, the churchwardens, during absence, can appoint, and no inconvenience arise. It must be remembered that the general erection of pews was not alone for the mere convenience of the parishioners, but also for the convenience of an orderly attendance upon the duties of religion. If a parishioner was allowed to hold two pews, one in the old Church by faculty or appointment, and another in the new Church by rental, he could appropriate the pew in the new Church to any person he pleased, and fill the

Argument against faculty right and renting right being co-existent.

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Church with strangers (for if one man had the power to do so, the rights of all being equal, all could lay claim to the same right), and, thereby those whom the law has appointed as occupants, would be ousted of their rights.

The same argument which is here applied particularly to faculties, would act with equal force upon the prescriptive title (when in favour of a pew in the nave of the Church) and also upon the possessory title, and it is submitted that, in each case, it would be an election, and, consequently, would be a subversion of the prior right, be the claim of whatever nature it might.

Renting pew, and afterwards quitting parish.

So if a person being a parishioner rents a pew, and afterwards quits the parish, it is presumed that the holding would continue to the end of the term of letting, and not be void immediately upon leaving the parish.

Letting pews to neighbouring parishioners.

There seems to be an anomaly in the statute, *viz.*, the right to let, unlet pews to the parishioners of the neighbouring parishes, but which is a great strengthener of the argument, that rent, and rent only, is the consideration for the use of the pews built in the Churches erected under the provisions of the statutes.

Limitation of letting.

But then the statute expressly limits the right, it does not give the parishioner of the adjoining parish a concurrent right with that of the parishioners of the parish wherein the Church is situated, but says, "pews, unless let within fourteen days after the end of the year may be let to parishioners of the adjoining parishes,

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thereby clearly inferring that if there be an overplus of room after the accommodation of the parishioners, then such overplus room may be occupied by those other persons specified in the statute; but such letting is in no case to enure for a longer period than a year, and which pews are at the end of the year again to be posted on the Church doors as unlet; but parishioners only have the power of taking them over the non-parishioner who rented them before; thereby making a reservation in favour of any new parishioner whether he becomes an inhabitant by the building of more houses in the parish or from other causes.

Construction, neighbouring districts.

The intendment of the words, "neighbouring parishes," may be reasonably questioned; for in the act it is said, that after the death of the then incumbent, the districts are to become district parishes; and the question, therefore, would be, is the word "neighbouring" to be limited to the several districts which before made one parish, or to other parishes, between which and the district in question, there has been no former connection? If then it is to apply to the parishioners of foreign parishes, a district in each parish might join. Is then the limitation to be construed as applying only to that particular district, or to the whole of the parish of which it was formerly parcel? For it must be remembered that until the death of the then incumbent, the districts are not to be severed from the mother parish.

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REMEDY FOR DISTURBANCE, &c.

Parnham v. *Templar*, 3 *Phil.* 522]. A person who is entitled to a pew by immemorial prescription has such an interest in it that on interruption the interrupter is guilty of an ecclesiastical offence. Interruption

Dawtree v. *Dee and Others*, *Bridg.* 4]. Action on the case for a disturbance. Disturbance for.

Declaration stated plaintiff was seised of the fee of a capital messuage, &c., of the annual value of 100*l.*, &c., and that in the Church of Petworth, there is a little chancel, &c., and time out of mind there were seats in the chancel, and the plaintiff and those whose estate he hath, time out of mind, repaired at their charges the chancel, and by reason of which, &c., he, &c., hath liberty to sit, and bury therein, and to give permission to bury any dead bodies therein, and that no other person, time out of mind, have been used to sit or bury in the said chancel. Nevertheless, the defendant intending to disinherit, &c.

Pleas: the Earl of Northumberland, &c., is seised of the fee of the honour of Petworth, and of the said little chancel as parcel of the said

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honour, and the defendants at the Earl's commands, &c., which are the impediments complained of.

To which plaintiff demurred.

Held: the declaration was good, and particular enough, as in a *quare impedit*, the plaintiff did allege generally that the defendant hindered him to present, and that was good, and all the Judges agreed that the plea in bar was utterly deficient, for one cannot have the freehold of a Church or any part thereof. Judgment for the plaintiff.

Disturbance.

Merchant v. *Whitepane*, 2 *Lev.* 193]. Case: seisin in fee of messuage, and all, &c., have had a seat in the Church, and *toties quoties necesse fuit* have repaired it, and the defendant disturbed him of his seat. After verdict for plaintiff upon plea of *non culp.*, it was moved in arrest of judgment, that the plaintiff had not prescribed time out of mind.

Court held: it is said he was seised in fee, and that he, &c., and the fee has been time out of mind, &c., by consequence all those whose estate, &c., have time out of mind had this seat, but in this action, it being founded upon his possession it is sufficient.

Disturbance, prescription.

Bunton v. *Bateman*, 1 *Lev.* 71]. Case for disturbance of seat in aisle of Church, prescription that he and all the tenants of such a house

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had all the seats in the said aisle. It was moved in arrest of judgment, that he had not showed any cause or consideration for the prescription as to repair, &c., held, it is good in an action on the case against a disturber, but not in a prohibition. In case, where one claims a title against the ordinary, he ought to show a title by repairing, &c., but not when against a trespasser or *tort feasor*. Judgment for plaintiff affirmed, and also upon writ of error.

Disturbance and prohibition, difference of.

Wylmer and Mott v. *French*, 1 *Add. Eccl. Rep.* 41]. A curate acting in opposition to the churchwarden, in altering a pew, would be punishable by citation, into the Ecclesiastical Court, at the suit of the churchwardens, for the curate has no authority to alter the seats, (*Ib.* 526).

Curate interfering in disposition of the seats.

In a suit for perturbation, if the complainant was not improperly disturbed, the defendant will be dismissed, but there will be no further question, the Court will not confirm the disturber in the possession of the seat.

Dismissal of suit for perturbation.

1 *Burn's Eccl. Law*, 359]. If any seat be taken away by a stranger, the churchwardens, and not the parson, may have their action against the wrong doer.

Taking away seat.

Degge's Parson's Counsellor, by Ellis, 7th ed., 211]. If any person builds a seat, without the

Removal of seats.

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licence of the ordinary, or the consent of the minister and the churchwardens, or in any inconvenient place, or too high, it may be pulled down by the order of the bishop, archdeacon or churchwardens, with consent of the parson, (*quære*, in the case of a faculty). The freehold of the Church, and of all things annexed thereto, is in the parson; and if any one cut or pull down a seat annexed to the Church, though he set it up, the parson may have trespass, but if the seat be set loose, he that builded it may remove it at pleasure.

Materials, in whom.

Ib. 214]. Though the freehold of the Church is in the parson, he cannot pull down any seats anciently erected, or if late erected, but by the permission of the churchwardens. If any be pulled down, the property of the materials is in the parson, and he may use them, if placed in the Church, without legal authority; but when by the parishioners, on good authority, I take it, the property, on removal, is in the parishioners.

Seating by ordinary in proprietor's seat in aisle.

Watson's Clergyman's Law, 711]. If the ordinary places another in a seat in the aisle with the proprietor, he may have an action on the case against the ordinary; and if he be impleaded in the Spiritual Court, inhibition will issue: so if a private person sits in the proprietor's seat, or buries without his consent, in the aisle an action on the case will lie, and that though the fee of such aisle is in the incumbent.

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Because the Church is dedicated to the service of God, and is for the use of the inhabitants, and was erected for their convenience. The use thereof is common to all the people who pay for the repairs of it; and if a seat affixed to the Church be taken away by a stranger, the churchwardens and not the parson shall have an action against the wrong doer.

Removing materials of pews, possession in whom.

If a man with the assent of the ordinary builds himself a pew in the nave of the Church, and another pulls it down or defaces it, trespass will not lie; for the freehold is in the parson and the remedy is in the Ecclesiastical Court, (*Ib.* 718).

Remedy for defacing pew.

1 *Siderfin*, 203, Lord *Hale*]. Title to a seat at common law is in an action on the case, and though the plaintiff need not show reparation in his declaration, he should prove it in evidence.

Action at common law.

Gibson v. *Wright and Another*, *Noy*, 108]. Trespass against churchwardens for removing a pew, (which had been erected without permission), and cutting up the timber. Court held, that though they had a right to remove the pew as churchwardens, yet they cannot cut up the timber of the pews. The verdict was against them.

Removing pew, and cutting the timber.

Barrow v. *Keen*, 2 *Keble*, 342]. Trespass

Breaking

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seat, action for.

for breaking a seat belonging to the plaintiff, prescription for house being in another parish. The defendant justified, that he had a house in the parish, and by reason thereof used to repair and therefore sit therein as was lawful, and traversed the prescription of the plaintiff. Motion in arrest of judgment; because for his house in one parish he cannot have a seat in another by prescription—*sed non allocatur*. This seat being in the aisle, and issue being taken upon the prescription, which hath waived the other matter; but the Court conceived a prescription for a seat by an inhabitant in another parish, is ill, unless he prescribed for the aisle, or *pro sedile*, or show that he used to repair; but after verdict, these are intended, and are necessary evidence, (*et vide, supra*).

Trees in churchyard.

Watson's Clergyman's Law, p. 211]. If trees are cut down in the churchyard by any other than the incumbent, he may sue such trespasser in the Spiritual Court, to have him punished but not for damages.

Parish doing part of the repairs of an aisle.

Anonymous, 3 *Salkeld*, 85]. Faculty for a seat in the nave of a Church, (*nave Ecclesiæ*), by prescription: some special matter must be shown, as repairs, otherwise; if it be of an aisle, but in the body of the Church, he may give the repairs in evidence; but an aisle may be on the lands of a private person; the repairs done to

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an aisle, must be done by the person, and not with the help of the parish, or the ordinary may appoint to the seat.

3 *Salkeld*, 89]. When two parishes have been united, one parish is extinct, and both must repair the Church. Two parishes united.

Jarratt v. *Steele*, 3 *Phil.* 167]. The impropriator of tithes forcibly entered the Church three several times by various ways, and pulled down two pews, and erected others in the chancel. Sir *J. Nicholl*, in giving judgment, said, "All persons ought to understand that the sacred edifice of the Church is under the protection of the Ecclesiastical laws, as administered by these Courts; the possession of the Church is in the minister, and churchwardens, and no person has a right to enter it, unless when open for divine service, without their permission, and under their authority; pews already erected cannot be pulled down, without the consent of the minister and the churchwardens, unless after cause shown by a faculty, or license by the ordinary." Forcible entry into Church by lay rector.

Snelgrove v. *Brograve and Others*, *Palmer*, 161]. Two who are tenants in common in a pew, cannot have a joint action, it must be a several. *Lee*, C. J., said, "when they maintain their right of possession by a title which is derived

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through prescription, they ought to prescribe severally, for their title is several; for there can be no maintenance of a joint title by prescription, which can render them accountable as tenants in common, (*Watson's C. L.* 719, *S. P.*).

Com. Dig. "*Abatement,*" (C 8)]. In a case of joint tenancy it is different, for if one sues by himself, the defendant may plead that the plaintiff has nothing, except jointly with such and such an one.

Com. Dig. "*Ac. on the Case, Disturbance,*" (A 3)]. An action on the case may lie for a seat in the aisle of a Church, where a man has a right by prescription, or in the body of the Church (*nave Ecclesiæ*), or the chancel, or for priority in a seat against a stranger. It is sufficient to declare upon his possession, without alleging usage to repair, prescription, or other ground of action, for it is sufficient if it be proved in evidence; so it is sufficient to say defendant disturbed him, without mentioning specially how the disturbance was.

Province of the law.

The province of the law is to provide a remedy for every wrong: and as the wrongs in themselves differ, certain forms of action have been adopted to meet the exigencies of each particular case.

Right of parishioner in the parish

It has been laid down (*supra*, p. 11), that every parishioner has a right to a seat in the

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parish Church, and the law has, therefore been careful that he should be enabled to exercise that right in a full and satisfactory manner: and if he be molested in his appointment, whether it be merely in right of the appointment of the ordinary; exercised by the churchwardens, and termed, "a possessory title," (*supra*, p. 11): or whether it be by the special appointment of the ordinary, by the grant of a particular pew, or sitting, by an instrument in writing termed "a faculty;" or whether it be by prescription, which is supposed to be based upon a faculty, the law has provided a remedy: in the first case, (*viz.*, the possessory title), by a suit for perturbation in the Ecclesiastical Court, against the intruder, for an inhibition or admonition not to disturb the plaintiff.

Church, disturbance of.

Necessities to maintain suit for perturbation.

For the purpose of maintaining this suit, the first ingredient is being appointed by the churchwardens to the pew; the house in respect of which the pew is claimed being entitled thereto, (*supra*, p. 14). Long acquiescence of the churchwardens in a person occupying a seat, without appointment, would be deemed an appointment, and they could not disturb the occupant, without a very sufficient cause, his wants being equal to the pew, (*supra*, p. 15); by the possessory right or appointment the pew does not become annexed to any house, but is a mere right of user in the person so long (provided it does not interfere with the general convenience

Long acquiescence of churchwardens in occupation of seat, effect.

Appointment of churchwarden, effect.

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of the parish), (*supra*, p. 15), as he is a resident parishioner, and his wants are equal to the appropriation, (*supra*, p. 19): for the sustainment of this suit, the appointment of the churchwarden is sufficient.

Sale and purchase, effect.

Sale and purchase would operate against the claim, (*supra*, p. 19), and it is more than doubtful whether such possession would give a sufficient possessory title against a disturber; above (*Ib.*), it is said, it *may* give a title, and which is said by Sir *J. Nicholl* very doubtingly, if the allegation, whereon the action is founded be on the wrongful title, it would seem, according to the general rule of law, impossible to maintain it; for however proper the person in possession, (if such a term may be used when the occupation is not continuous), may be to occupy the seat, the disturber may also be a person equally eligible. The presumption in the case of the allegation, as above, could never arise from the acquiescence of the churchwardens; for their power extends merely to the appointment of the parishioner, and not to the confirmation of an illegal title, (*supra*, p. 16), because, on their confirmation, the title by which the occupant held, would be a new title, and by the appointment. The complainant would, it is presumed, be in the position of a parishioner relying merely upon his common right to occupy any unappropriated seat, and, without the appointment, it would be a mere occupancy from time to time, and any parishioner taking pos-

Churchwarden's power.

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session of the seat before its usual occupant, would not be *in delicto*, and if he be not *in delicto*, he could do no wrong, for he had an equal right with the other to occupy an unappropriated seat.

Suit for perturbation, when.

The suit for perturbation could only arise upon intrusion, and, therefore, at the time of the taking possession, the seat would be unoccupied. The right of each parishioner would be equal, and each being equal in rights, the one could not do wrong to the other, and, therefore, it is that it is said to be very doubtful if such a title could support a suit for perturbation: (*supra*, p. 21), and, it is conceived, the same doubt would apply, even if it were a stranger who took possession, for the parishioner has no title, unless it be his general common law right, wherefrom to give even *color*, and it is thought the right would be too general to support the suit, though it would be sufficient to maintain a suit against the churchwarden, on a suggestion, for refusal to appoint, there being unoccupied, or illegally appropriated pews, (*supra*, p. 16).

Possession of unappropriated seat by a stranger, effect.

The right to attend the parish Church, is inherent in every parishioner, and the duty to attend a place of worship is obligatory upon every Christian, and, therefore, though not a parishioner, the stranger is doing no wrongful act by his occupation, though he is interrupting the common right of a parishioner to a seat in his Church.

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Right of suit before appointment of churchwardens, on intrusion of a stranger.

If there be a right of suit in any one before appointment it would be in the ordinary, by reason of the interruption of him in the administration of his office; but if the churchwarden, upon the intrusion, appointed a parishioner to the seat, the right to the seat would immediately enure, and possibly he could bring the suit; but without the appointment it is apprehended the title would be insufficient to support a suit even against the stranger, (*sed vide supra*, p. 23).

Parishioner in a seat, forcible ejectment.

On the other hand, if the parishioner was in possession of his usual seat, though not by appointment, and another parishioner came and ejected him by force, then the remedy would be by an action of trespass, so it might be by citation into the Ecclesiastical Court for brawling in the Church, and by indictment, but it never could, it is conceived, be the foundation of a suit for perturbation, (*supra*, p. 14).

Appointment of the ordinary, remedy for disturbance of.

The appointment of the ordinary is for the purpose of preventing confusion in the Church. "A mere right to sit in a particular pew is not such a temporal right, as in respect of it an action at common law is maintainable; disturbance is a matter for ecclesiastical censure only," (*supra*, p. 18). If in a suit for perturbation it be shown, that the plaintiff was not improperly disturbed, the defendant will be dismissed: the Court will not thereon confirm the plaintiff in the possession of the seat, (*supra*).

Title by faculty, remedy for disturbance.

Title by faculty confers upon the grantee a right to sit in a particular pew, and during the

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fulfilment of the condition is an exclusive right; during use. A prescription which is based upon a faculty also confers the same right.

For disturbing the grantee of a faculty, or he who can adduce a prescription, the remedy at common law is an action on the case. Remedy at common law.

"The action upon the case is founded upon a wrong," (*Action on the Case, Com. Dig.* (A)), and formerly it concluded *contrà pacem*, (*Ib.* (C)); "it will lie in all cases where a man has a temporary loss, or damage by the wrong of another:" (*Ib.* (A)); "and was substituted originally for the wager of law, (*Doc. Pl.*, p. 27). Action on the case, what.

From its nature, action on the CASE is aptly constructed so as to answer the purpose of bringing to an issue almost all disputes arising between man, and man: or for obtaining a just restitution, and satisfaction for any illegal infringement of human property." (*Doctrina Placitandi*, p. 27). "When the act is not immediately, but, only by consequence, injurious to the plaintiff, case is the proper remedy; but if the act be immediately injurious to the plaintiff: damage done to the plaintiff's colliery by what defendant has done in his own, upon his own soil, though several others lie between them, the damage is not immediate, but consequential: therefore: trespass *vi et armis* will not lie," ("*Ac. on the Case*," *Com. Dig.* (A)). Trespass.

"To maintain the action there must be a temporal damage," (*Ib.* (B 2)), "and it must be

a particular damage to some person," (*Ib.* (B 2)); "there may be a *damnum sine injuriâ*, and it is admitted an action will not lie for a damage without an injury. But from thence it does not follow that an action will not lie for an injury without showing some special damage, for every injury implies a damage. If there be an injury, though no damage, an action at common law will lie, if it be a common law injury, for the remedy is always of the same nature as the injury, (*Doc. Plac*, p. 27). And though there be damage if the act be not prohibited by law, the action does not lie, ("*Ac. on the Case*," *Com. Dig.* (B 3)). Nor where the damage happens by the default of the plaintiff, (*Ib.* (B 4)); nor for a wrong which is a felony; (*Ib.* (B 5)), nor for a mere trespass; as pulling down a wall: or taking the tiles off a house; unless it be alleged that thereby the timber was rotted, (*Ib.* (B 6)); nor where the law, or a statute has provided another remedy, (*Ib.* (B 8)).

Such are the general rules which govern this action, and they are here particularly set forth to show how reasonable is that rule of law which says; trespass may not be had for the disturbance of a pew right: and which in every phase embraces the particular injury which is sustained by the intrusion; it is needless to go again through the statement; for it would be only uselessly swelling the text.

Case, neces- Having shown the action will lie, it is con-

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sidered well to give the necessaries of the declaration. "A naked promise would be a *nudum pactum*, and is not in law a sufficient foundation for an action; there must be a consideration, and the consideration must be particularly set forth in the declaration, so that the Court may judge whether it be sufficient to maintain the action, (*Doc. Plac.* p. 28). In the case of a disturbance of a pew right, "the declaration should state the possession of the messuage, the right by reason thereof to use a pew in the parish Church during divine service, and the disturbance of the right by the defendant," (*Roscoe's Dig. of Evid.* 6th Ed. p. 349. See *Appendix for Declaration*).

saries to declaration.

"Against a wrong-doer possession, *primâ facie*, may be a sufficient title, and it is not necessary to set forth so strict a title as against the ordinary; it was held sufficient to lay the pew as appurtenant to a house, but it must be taken as legally appurtenant:" (*supra*, p. 21); so where one claims a title against the ordinary, he ought to show a title; &c., but not when against a trespasser or a tort feasor (*supra*, p. 163). The usual mode of declaring is, "that the plaintiff *was* (*is*) possessed of a certain messuage, and by reason thereof, ought to have for himself and family inhabiting the said messuage, the use and benefit of a certain pew" (1 *T. R.* 430); but "such an action can only be maintained on proof of a faculty, or by such evidence as leads to the presumption of a faculty."

Case, against a wrong-doer.

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The learned author of the able work, *A Practical Abridgment of the Ecclesiastical Law* (F. N. Rogers, Esq.) lays it down (p. 175), "that the above general mode of declaring in an action for a disturbance, is, in *all cases* sufficient, although a distinction is taken in some of the old cases between making a title against the ordinary, and a title against a wrong-doer." With great deference, it is considered such a conclusion cannot be supported, for in all the cases upon the subject, a distinction is made, and it is apprehended the distinction between the two cases is well defined, and is not the mere "splitting of a hair."

Declaration against wrong-doer.

In the case of a wrong-doer, possession by a *rightful* title is sufficient: the word *rightful title* is used in contradistinction to that possession which a man has in a house: in such case his need compels him to be sheltered, and, therefore: the law considers his holding without occupation, a possession; and into that house no one has a right to intrude, even though the possession is in wrong; unless, by the authority of the law. But in the case of a pew, the most absolute title confers the mere right of the exclusive user of a thing built upon the soil of another; therefore: when the occupant of the pew is rightfully in possession as against a wrong-doer, his possession is sufficient, because, by his possession, he has a *primâ facie* title.

Title by possession, what.

Title to a pew, what.

Action against the

But as against the ordinary, the case is far

different, for he, in virtue of his dignity, has, for the prevention of disorder, the right of disposing of the pews, and it might be the general convenience of the parish demanded an alteration in the disposition of the parishioners; and he would, in such case, have the power of removing any parishioner, unless he could shew a title to the sitting paramount to his; and which he could only do, by proving a faculty, or a prescription. ordinary necessaries.

The ordinary's right in the case of pews is in the nature of that of a lord paramount, and therefore: it is considered something more than a bare right should be alleged: as against a wrong-doer, the plaintiff's repairs need not be proved: but as against the ordinary, repairs should both be set out and strictly proved (*vide supra, et infra*), for the faculty, or the prescription is a controlment of him in the right which is annexed to his dignity, therefore, it should be alleged with the greatest certainty.

For these reasons; it is said to be very doubtful whether, showing a mere possessory title in the declaration, in an action against the ordinary, is sufficient: though possibly it might be sufficient in actions on easements (really such); but then much certainty must be used in setting out the right, and it must be strictly proved. Easement, similarity of action.

Case at common law is the remedy for a disturbance: and TRESPASS for an injury to property. The reason why trespass cannot be brought is;

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that for the purpose of warranting it, the freehold, or property must be vested in the person: which it cannot be said to be in the case of a pew right, for the soil of the Church, &c., is in the parson.

Trespass, action of.

"Trespass, in its largest, and most extensive sense, signifies any transgression, or offence against the laws of nature, or society; taking or detaining a man's goods are trespasses, but in its more limited and confined sense" (*Doc. Pl.* p. 415), (and in which phase it is here to be considered) it signifies no more than an entry upon another man's ground without a lawful authority; and doing some damage to his property; (*Ib.* 415), for every man's land, in the eye of the law, is set apart from his neighbours, either by a material, or an ideal fence.

Trespass, who can maintain.

One must have a property, either absolute or temporary, in the soil to be able to maintain trespass, and though he has the freehold, he must have entered, and have become possessed, (*Ib.* 416, *et Com. Dig.* "*Trespass* (B. 3) *S. P.*).

Trespass and case, difference between.

The difference between TRESPASS and CASE is, that in *trespass*, the plaintiff complains of an immediate wrong, and in *case* of a wrong in consequence of another act, (*Doc. Pl.* 422). Trespass is maintainable by the party to whom the wrong is done, (*Com. Dig.* "*Trespass*" (B. 6)).

Materials of pew, when severed, in whom.

It was laid down in *Gibson* v. *Wright and Another* (*supra*, p. 165), that a person who entered the Church a mere wrong-doer, and builded a pew which the churchwardens removed

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and cut up; that such wrong-doer could maintain trespass against them, not for the removal of the pew, but for the destruction of the materials.

Consideration of.

It is very difficult to understand what right the wrong-doer could have in the property of the materials of which the pew was constructed, after it was once fixed to the freehold; for on the fixing to the freehold, the right to the thing becomes vested in the freeholder; and that in a case where the affixing was done under a good title: as in the case of a tenant: how much stronger then should be the argument where the addition is made by a *mere wrong-doer*. Is it meant to be said that because he enters, and thereby does a wrong, that he shall again enter, and do another wrong? for if he enters to remove the materials, he must commit a trespass: or, is it to be contended that if the parson, or churchwardens refused him entrance, that trover, or detinue, would be maintainable for the materials?

It is considered that the case as reported in *Noy*, is not law, because it is opposed to the principles of law, for if the materials once become the property of the parson, as it is presumed they do, shall it be said that the removal of them shall devest them, and give the wrong-doer the original right which he had in them?

In the case of *Jarratt* and *Steele* (*supra*, p.

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167) the person entering the Church was the lay impropriator, and who entered for the purpose of removing certain pews from the chancel to which he laid claim as of right, and to erect others. But in giving judgment Sir *John Nicholl* held no language which could at all be said to be a recognition of the case above; but the very opposite: and though there is a difference between the technicalities of the Common law, and of the Ecclesiastical Courts, yet the grand leading principles are the same, and the latter Courts in temporal matters are bound to respect the decisions of the common law Courts.

Pews erected by the parish.

So it is said, that the materials of the pews which are erected by the parish, and for the general convenience of the parishioners, shall, on being taken down, belong to the churchwardens, and not to the parson. It is presumed the principle which would guide the case above, should also have weight in this in discussion; the pews are affixed to the freehold, not as mere fixtures, or ornaments, but as part, and parcel thereof; the churchwarden has not the possession of the pews, but the care of them, and the right to them, it is conceived, vests in the parson upon their erection, unless the right was specially reserved.

Repairs, effect.

The repairs which the parishioners bestows upon them is not for the benefit of the freehold, but for their own convenience; a tenant, on erect-

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ing premises upon a freehold, repairs them, but by such repairs (though there be no covenant) he does not devest the right of the reversioner.

The analogy between the erection of pews in a Church which is the freehold of another, and the erection of buildings by a tenant, is complete; in both cases it is apprehended the builder has a mere right of user.

It may be said that a Church is a building dedicated to a special purpose, and that the pews are necessary adjuncts to carry out the purpose in an orderly and convenient manner.

It is admitted they are necessary adjuncts, but to prove the objection it must be shown that without them the special purpose could not be carried out. Orderly behaviour (for disorder would be the real objection) may be compelled by citation into the Ecclesiastical Court, but that would be a measure which, it is presumed, would be found not to work well: yet, if it can be done; and it can, it proves that though pews exist, they are not part, and parcel of the special appropriation.

It may also be said that the founder, in the chancel has such a property in the banners and the tombs, of his ancestors erected therein, as will enable him to maintain an action against a person removing or defacing them; truly, but it is in consideration of a supposed special reservation in him at the time of founding the Church, Founder's right.

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and that the intention of the foundation was to provide for his particular wants.

Materials of pews erected by the parish.

The property of the materials of the pews in question might be in the churchwardens, but it could only be by the special agreement of the parson, it could not be of common right, because after the time of legal memory pews were erected, and, therefore, there could be no custom that the churchwardens should have the old materials, and though the parson is seised of the fee of the Church he could not destroy or pull away any of the pews erected under a rightful title, for the parishioners, for particular purposes, may be said to be tenants *in perpetuo* of the Church, but if they remove the pews, the materials (unless by special agreement) belong, it is apprehended, to the parson, and he, perhaps, could compel the erection of other pews upon the site of those removed.

Injury to a pew, right of action in whom.

It is said also (*supra*, p. 165), that if a man, by the consent of the ordinary, builds a pew and another pulls it down, or defaces it, he shall not have trespass, but shall cite the offender into the Ecclesiastical Court; trespass will not lie, because the freehold is in the parson, but it is presumed the parson could have trespass, and not, as it is said, the churchwardens, for the injury is an injury to his freehold.

Trees in a churchyard.

The trees in a churchyard are in the incumbent (*quære* parson) (*supra*, p. 166), for it is said

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they are for the purpose of repairing the chancel. If the reason is correctly given, it is apprehended the right to them would be in the rector, for he is the person who is compellable to the repair of the chancel of the Church, and if the trees are to be appropriated for that purpose, he would be the person injured by their removal or destruction, for the freehold of the Church is said to be in the parson rather than in the incumbent (*supra*, p. 7).

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PROHIBITION.

When it will be awarded.

Hollocks v. *The Master and Fellows of the University of Cambridge*, 9 *Dowl. P. C.* 583]. In this case it was said the University had usurped the seats to the exclusion of the parishioners, and the application was for a prohibition against the grant of a faculty to the University for the erection of a gallery. "This Court has not the power to prohibit the Ecclesiastical Court from granting a faculty, which is not denied to be properly within the limits of its jurisdiction. The suit in that Court must, therefore, be allowed to proceed, and this Court must wait and see what the Ecclesiastical Court will determine in respect of it. It would be improper to assume that the Ecclesiastical Court will not limit the faculty to those objects for which it may be lawfully granted, (*Ib.* 586. 1 *Gale & Davidson*, 100. *S. C.*)).

Bulmer v. *Hase*, 3 *East*, 220]. The Court of Queen's Bench will not grant a prohibition to the Court below against the grant of a faculty, which, when obtained, is no more than a

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license (*a*) of the ordinary to do a certain act, and would not bind the rector against his con-

(*a*) It is apprehended that a faculty is a grant, and therefore materially different from a license, for it confers an absolute and exclusive right. A license might not be incompatible with a grant, for it might be a mere permission to do a certain thing at certain times—as to sit in a pew, when they who held it by prescription, or claimed it by faculty, or even by a possessory title, were absent.

A grant would clearly be incompatible with a grant, for it would be an exclusive right to the same thing to be exercised by two different persons at the same time, which would be a thing impossible; and therefore: a grant cannot be co-existent with a grant.

In the case of a parishioner, by the license of the ordinary, using a pew during the absence of a person who has an exclusive right therein, it is apprehended such person could not proceed against the ordinary in the Ecclesiastical Court in a suit for perturbation, or in the common law Courts in an action on the case for a disturbance, for the user is only at a time when he who has the right is absent, and is only an exercise of a right which is inherent in every parishioner, *viz.* that of being seated in the parish church.

The effect of a faculty, we have seen (*supra*, p. 32), is to confer an exclusive, and so long as the condition is fulfilled, a right paramount even to that of the ordinary himself; it is presumed that though the faculty confers on an individual, or individuals, an exclusive right to sit in a certain place in the parish church, yet the inducement for the grant is the necessity of the grantee, and therefore vests only during the time of its user, and not whether present or absent; and as all parishioners have a right, equal one with the other to be seated, and it follows that the exclusive right is only conferred during user, or by possibility the parish church might be empty of its proper occupants, and yet there be room sufficient for all.

And, therefore, is it said that a license would not be incom-

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sent, if by law it was necessary; if the faculty, when obtained, was used against the rector's consent, it is time then for him to resort to his legal remedy. If he can be properly made a party to the suit below, and urge a just reason to the Court why the faculty should not be granted, and it be disregarded, it will be ground of appeal to the superior Court, and if the reasons urged by the rector be improperly overruled, it is ground of appeal, and not prohibition. Lord *Ellenborough*, C. J.

Jones v. *Stone*, 2 *Salkeld*, 550, *Holt*, *C. J.*]. A bare inhibition only is not sufficient ground for a prohibition, unless it concerns a layman.

Plea before prohibition.

Anon. 2 *Salkeld*, 551. *Holt*, *C. J.*]. Before a prohibition the parties must plead, for perhaps they may admit the plea.

patible with an exclusive grant, or faculty, the license might be to use the seat, or pew during the absence of the grantee: and at such times only; (but a faculty could not be so limited), and suit could not be against the ordinary for such a license. But in the case of a grant upon a grant, perturbation or case would lie, for they are things incompatible.

It is with the greatest deference that the above exposition is offered; but in the judgments of great men, a false definition is too apt to be seized upon, and put forth in argument, not as a mere dictum, or definition, but as a decision, and on which case on case is too often reared, until that which is in positive opposition to the very basis of law, which is PRINCIPLE, is received as law itself.

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Sands and Adam v. *Unwin Noy*, 153]. No prohibition may be originally granted out of the common bench unless there be a plea depending in the Spiritual Court for the same thing, and not upon the bare surmise.

Burdett v. *Newell*, Lord *Raymond*, 1211]. On a motion for a prohibition there must be an affidavit that the matter suggested to have been pleaded was pleaded in the Spiritual Court. Affidavit before prohibition.

Jacobs v. *Dallow*, 2 *Salk*. 551]. If a modus be pleaded and admitted no prohibition shall go; but if the question be, whether it be a right or no right, then a prohibition shall go; and whenever the matter suggested is foreign to the libel, it must be pleaded below before a prohibition can be granted, not so when it appears upon the face of the libel. Prohibition, when it shall go.

The plaintiff declared in prohibition, setting forth a prescriptive right in the plaintiff and those whose estate he hath, to a seat in the Church, and defendant, surmising an usage, time out of mind, libelled against him in the Spiritual Court for disturbing him, and showed he denied usage in the Spiritual Court, and the Judge refused to allow his plea: the defendant traversed the plaintiff's prescription, and pleaded his own usage, on which there was a demurrer. Mr. *Eyre* urged, that though the plaintiff, by his demurrer, con-

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fessed his prescription to be false, and by consequence that he had no right to the seat, yet the defendant, grounding his libel below on a custom which is not triable there, he could not have a consultation. *Holt*, C. J.—"If the plaintiff had no title by prescription he ought not to disturb the possession of the defendant, and the ordinary hath connusance of such disturbance, and may settle it according to usage and possession, unless there be a temporal prescriptive title hurt by their sentence. Defendant might well sue in the Ecclesiastical Court to have his possession quieted, and might admit his prescription to be tried there; as a defendant does a modus, or a pension, by prescription.

Prohibition, priority of seat.

Carlton v. *Hutton*, *Noy*, 78]. Claim of the upper seat by prescription, and is disturbed; the Bishop sends an inhibition until the matter be determined before him; a prohibition was awarded, because it does not belong to the Spiritual Court, for as well priority of seat as seat itself may be claimed by prescription, and case lies for it at the common law.

Matter of ecclesiastical cognizance after sentence.

Gardener v. *Booth*, 2 *Salk.* 548]. Where it appears in the libel, or in the proceedings in the cause that its cognizance does not belong to the Ecclesiastical Court, a prohibition may be moved for and granted after sentence in all cases except where one is sued, but out of his diocese, for

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there, if he taketh not advantage of it before sentence, he shall not have a prohibition after, because the cause is within the jurisdiction of the Spiritual Court. If not to the particular Spiritual Court wherein tried it doth to some other, and not to the temporal Courts.

Prasgrove v. *The Churchwardens of Shrewsbury*, 1 *Salk.* 167]. A prohibition was prayed to a suit in the Spiritual Court where the churchwardens prescribed to dispose of the pews exclusively of the ordinary (*sed per curiam*), that cannot be, the ordinary not acting might be, because there was no occasion for his intermeddling, but that cannot vest the right in them who are only a corporation capable of receiving goods, but not of inheritance, *sed adjournatur.*

Claim by churchwardens, independently of ordinary.

Greatcherchy v. *Beardsly*, 2 *Lev.* 241]. "Porhibition was prayed on a suggestion that time out of mind the parishioners built and repaired the seats of the Church at their own charges, and, *ratione inde, &c.*, have time out of mind been disposed of by the churchwardens, and now the Bishop took upon himself to dispose of them. *Jones*, J., delivered the judgment of the Court. Of common right, the ordinary hath the disposal of all the seats in the Church, and, of common right, the parishioners ought to repair them. Then what have they done here to oust the ordinary from his jurisdiction? They have said they

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repaired the seats at the parish charge, which is no more than their duty, for which they have the *easement* (*vide supra*, p. 43) of sitting therein according to the disposal of the ordinary. A prohibition was denied."

Prohibition, reason for.

Watson's Clergyman's Law, 718]. "The reason why a prohibition shall be granted where a prescription, or custom is denied; I take to be that the notion of a custom, and a prescription is differently considered by the Ecclesiastical Courts, to what it is by the common law Courts, as to the times in which such customs, and prescriptions may be created; the Ecclesiastical Courts allow of different times in creating customs, or prescriptions, and generally of less time than is allowed by the Courts of the common law, which own in such cases, but that whereof there is no memory of man to the contrary; therefore: the common law Courts, will not suffer the Spiritual Courts to try prescriptions, whereby they might affect, and charge person's inheritances by judging them to be good, which by the common law, are no prescriptions."

Wood's Institutes, bk. 4, c. 1, p. 499]. "By the 13 Edw. 1, *stat. de circumspecte agatis*, a prohibition lieth not for penance, corporal, or pecuniary enjoined for deadly sin; as fornication, adultery, or the like; also for not fencing the churchyard, or not repairing the church, or suffi-

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ciently adorning it, nor for oblations, tithes, mortuaries, pensions, laying violent hands upon a clerk, defamation, where money is not demanded, nor for breach of faith."

"By the *Articuli Cleri*, or the 9 Edw. 2, c. 1, 2, 3, 4, 5, &c. For tithes (not where the right ariseth from the rights of patronage, nor where they amount to the fourth part, &c.) oblations, obventions, mortuaries, commutation of corporal penance for money, laying violent hands upon a clerk, defamation, tithes of a mill newly erected, no *prohibition* shall be granted."

"As in temporal causes the King by his judges doth hear and determine the same by the temporal laws; so in cases spiritual, or ecclesiastical, the King by his ecclesiastical judges doth determine the same by his ecclesiastical laws. Therefore where the right is spiritual, and the remedy only by the ecclesiastical law, the cognizance doth belong to the Ecclesiastical Court. But where the common or statute law giveth remedy (whether the matter be temporal or spiritual), the cognizance belongs to the King's temporal Courts; and though the matter is spiritual, it shall be tried by a jury; and the Court, being assisted by learned advocates in that profession, may instruct the jury in the ecclesiastical law, as they usually do in the common law. Thus it is, unless the jurisdiction of the Ecclesiastical Court is allowed, or saved by statute. Yet if the Ecclesiastical Court gives

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sentence in a matter of which they have cognizance, though against the reason of the common law, the judges ought to give credit to it, and believe it to be consonant to the law of the Church."

Temporal and spiritual matters judged in same Court.

"In the time of the Saxons there was in England no distinction between the lay and the Ecclesiastical jurisdictions; the County Court was as much a Spiritual, as a Temporal Court. For this purpose the bishop of the diocese and the alderman (*earl*) or in his absence the sheriff of the county, used to sit together in the County Courts: and had there cognizance of all causes, lay, as well as spiritual; a superior deference being paid to the bishop's opinion in spiritual, and to that of the lay Judges in temporal matters," (3 *Bl. Com.* p. 61). After the Conquest the bishop was withdrawn from the County Court "in obedience to the Charter of the Conqueror, which prohibited any spiritual cause to be tried in the Secular Courts," (*Ib.* 63).

Division of the jurisdictions.

Revival of old rule.

Henry 1st revived the union between the Civil and the Ecclesiastical Courts, but which union only continued for a short period. (The writ of prohibition ought to be granted *ex debito justiciæ*, (*Com. Dig.* "*Prohib.*") (C); it is of very ancient date, and in the reign of Henry 3, through the Archbishop Boniface, urging the clergy to resist the jurisdiction of the Temporal Courts, there were frequent contests between

Writ of prohibition.

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the temporal, and the ecclesiastical jurisdictions; and which caused at that time, the writ to be in repeated use. To the Spiritual Court it will be granted in all cases where the Ecclesiastical Judge proceeds in a matter which is out of his jurisdiction, and that, though the Temporal Court has not cognizance of the matter for which the libel is in the Spiritual Court; for, it is a sufficient cause for a prohibition that the Ecclesiastical Court exceeds its jurisdiction, (*Com. Dig.* "*Prohib.*") (F).

Writ of prohibition, who may grant.

"The writ of prohibition issues properly out of the Court of Queen's Bench, being the sovereign's prerogative writ. It may also issue out of the Court of Common Pleas, and the Court of Exchequer," (3 *Bl. Com.* 112). *Comyn* says, "the Chancellor and Chief Justice have power to determine what pleas ought to be prohibited in causes ecclesiastical, and, therefore; a prohibition may be granted by the Court of Chancery. So, the common bench may grant a prohibition, and the Court of Exchequer, though no plea be depending therein of such matters," (*Com. Dig.* "*Prohib.*") (B) (*a*), and *Blackstone* says, "where they (the Spiritual Courts) concern themselves with matters not within their jurisdiction, prohibition will go as effect.

Where it issues.

Temporal matters accessory to the spiritual matter.

(*a*) The Courts of Law at Chester, and of Great Sessions in Wales, may grant writs of prohibition to the Ecclesiastical Courts within their jurisdictions. *Com. Dig.* "*Prohibition*," (B).

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if they attempt to try the validity of a custom pleaded, and if in handling matters within their cognizance, they transgress the bounds prescribed to them by the laws of England, as where they require two witnesses to prove the payment of a legacy, &c., (*Bull. N. P.* 214, *S. B.*) and these questions, though they be not properly spiritual questions, are allowed to be decided in these Courts, because they are incident, or accessory to some original question within their jurisdiction, it ought, therefore, where the two laws differ, to be decided, not according to the spiritual, but by the temporal law," (3 *Bl. Com.* 112, *et vide Rogers's Eccl. Law*, p. 710, *et seq. S. P.*), or the cause would be determined different ways, and thereby create confusion.

Prohibition for action.

Bracton, (B) 407 says, "a prohibition lies that judgment should not proceed in an Ecclesiastical Court, sometimes by reason of the parties to, and sometimes from the nature of the suit, as when the cognizance thereof pertains only to the Crown and the Royal dignity. As, if a layman implead a layman before an Ecclesiastical Judge, concerning a lay fee, or something appertaining to a lay fee, because no privilege, such as the privilege of those who have assumed the cross (*a*),

(*a*) The tenants of the Templars and Hospitallers enjoyed a privilege as well against the King as against the lord to be free from tenths and fifteenths, and discharged from purveyance, and not to be sued for an Ecclesiastical cause before the ordinary, but before the conservators of their privileges, and also to give

nor of any other person, can alter the royal jurisdiction in this respect, even though the King will it; yet, he sometimes connives at it, (*dissimulat tamen hoc quandoque*), although it is against the privilege of his Crown, and dignity. Also, neither the promise, nor the oath, nor the voluntary renunciation of the parties, can alter his jurisdiction, although the parties prejudice themselves in the matter by their agreement. So a prohibition lies by reason of the parties to, or subject of the suit; as if a clerk, sue a layman, or a layman, a clerk, in the Ecclesiastical Court, concerning any of the things aforesaid; also by reason of the subject only, as if a clerk implead a clerk in an Ecclesiastical Court, concerning any of the things aforesaid; because, if the Ecclesiastical Judge should decide in such matters, he cannot order his judgment to be enforced: because there is no sheriff, or other minister of the law, who is compellable to obey him in executing the judgment, and if of himself he

sanctuary to felons, &c., these privileges at length became to be so greatly abused; that persons who were uncomected with either of the societies used to erect crosses upon their lands, (which was the distinguishing mark of the real tenants), and therefore claimed the various privileges enjoyed by the tenants of the Templars, and the Hospitallers. To correct this abuse, and which had become excessive, and to the great interruption of the orderly and proper administration of the laws, the stat. of Westminster 2, 13 Edw. 1st, c. 32, was enacted, which restrains all persons (not tenants) from erecting crosses upon their lands, under the penalty of having them declared within the provisions of the statutes relating to mortmain (*i. e.* forfeited to the lord).

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executed it; an assise of novel disseisin would lie against the Judge and him who executes the judgment.

"I say of a *lay fee* to distinguish it from FRANKALMOIN, which is more properly so called when it is dedicated, as it were, to God, as land given to the Church by way of endowment, at the time of its dedication: which is more privileged, and the cognizance whereof belongeth to the Ecclesiastical Court, than if it were given in Frankalmoin to Churches, and religious men, and of which the judication, and cognizance belongeth to the temporal Courts."

A suit for prohibition, where brought.

A suit for prohibition must be brought in the temporal Court, and whether the defendant proceeded, or not after prohibition, an attachment goes to bring him into the Court, (*Com. Dig.* "*Prohibition*," (C)). "The party aggrieved in the Court below, sets forth the matter of his complaint, it being drawn *ad alium examen*, by a jurisdiction, or manner of process disallowed by the laws of the kingdom; this used to be done formerly by filing of record what was called a suggestion, not traversable; but now, by the 1 Wm. 4, c. 21, application for a writ of prohibition may be made by affidavits only (*b*),

(*b*) Where a motion for a prohibition has been discharged, the Court will not allow the motion to be renewed upon affidavits stating matter not before presented to the Court but existing at the time of the original application, (*Bodenham* v. *Ricketts*, 6 *Nev. & M.* 537).

that is, in the way of an ordinary motion, by a rule to show cause. If the matter alleged, appears to the Court, upon the showing of cause to be sufficient, the writ of prohibition immediately ensues, commanding the Judge not to hold, and the party not to prosecute the plea." (3 *Stephens' Com.* p. 688; *infra*, p. 206).

Affidavit for rule *nisi*.

Where the point is too nice and doubtful to be decided upon mere motion, the person who makes the application, is directed to declare in prohibition; and which declaration should contain a venue, (*Raym.* 387), and therein must be set forth in a concise manner, so much of the proceedings as may be necessary to shew the grounds of the application.

Declaration in prohibitio

If the Court incline against granting the prohibition, they will not put the party to declare in prohibition, because the same application may be made to another Court, (*Linda* v. *Rodney*, 613, n.); but where the inclination is to prohibit, then leave is granted to declare in prohibition, (*Rex* v. *Bishop of Ely*, 1 *W. Bl.* 81).

When granted.

To the declaration, the party who is the defendant (plaintiff in the other Court) may demur or plead by way of traverse or otherwise, (*Hall* v. *Maule*, 5 *Nev. & Man.* 455), such matters as may be necessary to show the writ should not issue, and conclude by praying such writ may not issue, 1 Wm. 4, c. 21, s. 1.

Pleas to declaration.

In a prohibition, both parties are actors, and may take traverse, upon traverse, (1 *Tidd*, 700).

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If a plea be ill pleaded, and the question be improperly raised, the Court will direct that it shall be amended, (*Newson* v. *Baldry*, 7 *Mod.* 70).

Trial by proviso.

So a defendant may have a trial by proviso, without any laches of the plaintiff, (1 *Tidd's Pr.* 780).

Costs.

As the judgment is, so will be the costs of the application, and the proceedings attendant thereon, judgment shall lie to recover the same. If the verdict be given for the plaintiff in such declaration (*i. e.*, prohibition), then a jury shall assess the damages, and the judgment shall be for them also, but whether the jury do or do not assess damages, the costs will be given all the same, (*Ib.*).

Case, when not within statute.

Where a person has his rule made absolute for a prohibition, and is not put to declare the case is not within the statute, (*Rex* v. *Hedding*, 1 *Dowl. P. C.* 440).

Costs where allowed.

Nor where the prohibition is granted for the sake of a trial, as to try a parochial boundary; the costs incurred in the Ecclesiastical Court, before prohibition, will not be allowed, (*Tessimond* v. *Yardley*, 5 *B. & Adol.* 458).

Wrong construction of an Act of Parliament.

Prohibition will lie when the Ecclesiastical Courts construe an Act of Parliament in a manner different to that allowed by the common law Courts. Lord *Ellenborough*, after reviewing the various decisions which had gone before, mentioning particularly those wherein several

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Judges had given their opinions, as *Eyre*, C. J., in *Home* v. *Camden*, 4 *Term Rep.* 382; Lord *Loughborough*, in *Rymer* v. *Atkins*, 1 *H. Bl.* 187, and Mr. J. *Buller*, in *Home* v. *Camden*, and Lord *Vaughan* in *Hill* v. *Good*, *Vaughan*, 306; and he says, "that for these reasons, and that the rule may be laid down with more precision, and certainty, in what cases the Court will interfere by prohibition after sentence; to correct the misconstruction of an Act of Parliament (supposing it to have been misconstrued), as well as to consider whether it has been misconstrued in the present instance, we think it fit to order the plaintiff to declare in prohibition, *Gore* v. *Gapper*, *Clerk*, 3 *East*, 479, *et seq.*

In the case of Lord *Camden* v. *Home in Error*, *Buller*, J., said, "if it were competent to decide on the second question, whether or not the Court of Appeal had misconstrued an Act of Parliament, I should desire further time to look into the authorities, particularly those of *Lindo* v. *Rodney*, and *Wemys* v. *Linzee*, before I delivered my opinion upon it, not being at present advised, am inclined to differ from that given in the Court of Common Pleas; but I think that is not now competent to this Court to examine that question," 4 *East*, 596. The matter is now well settled, as stated in the text.

Where it will not be granted.

Where, in a declaration for a prohibition it was declared by the plaintiff, that he had been libelled by the defendant in the Spiritual Court,

and had excepted to the libel on different grounds, one of which was as to the construction of an act of Parliament, &c. Held, he had shown no grounds for a prohibition, as it did not appear that the Court below were proceeding to decide upon such construction of the act of Parliament, or that it would decide contrary to the common law, (*Hall* v. *Maule*, 3 *Nev. & P.* 461).

Refusal to deliver copy of libel.

Refusal of the Spiritual Court to deliver to the defendant a copy of the libel, according to the statutes 2 Hen. 5, c. 3, and 2 & 3 Edw. 6, c. 13, is the ground of a prohibition which will issue, *quosque, &c.*, after which the Spiritual Court cannot proceed until a copy is granted; so also if the proceeding be *ex officio*: there cannot be a prohibition for denying the defendant a copy of the libel, and the merits together; if a prohibition for the refusal of a copy of the libel be discharged, there may afterwards be a prohibition upon the merits: but prohibition for a refusal of a copy will not be made, unless an affidavit be made of the refusal (*Com. Dig. F.* 15).

Refusal to deliver copy and merits may not be joined.

Joinder in prohibition.

If several libels be exhibited against A. and B. in a matter in which the Court hath not cognizance, A. and B. cannot join in a prohibition; so also if the plaintiffs be several.

When two or more are allowed to join in prohibition and one dies, the writ shall not abate, for they only seek to be discharged, (*Cro. Car.* 162, *sed vide Yelv.* 128; *Owen*, B.).

A question of practice in a cause strictly of ecclesiastical cognizance, is not a matter for prohibition; and the only instances in which the temporal Courts can interfere to prohibit any particular proceeding in an ecclesiastical suit, are those in which something is done contrary to the general law of the land, or manifestedly out of the jurisdiction of the Court, (*Ex parte Smyth*, 5 *Nev. & M.* 145).

Practice of the Ecclesiastical Court. Prohibition, when to go.

On a motion for a prohibition, the Court are not bound to wait until the suit in the Spiritual Court is actually at issue; if the latter is clearly in progress towards the trial of a question over which it has no jurisdiction, (*Byerly* v. *Windus*, *Dowl. & Ry.* 564, *supra*). So, if the want of jurisdiction appears upon the face of the process, the Court will prohibit the sentence, (*Roberts* v. *Humby*, 3 *Mee. & Wels.* 126); but it will not presume that the Ecclesiastical Court will decide improperly in a matter over which it has cognisance; and though a faculty to appropriate certain parts of a parish Church be larger than the Court has power to grant, the Court will not interfere in prohibition, (*Hallock* v. *Cambridge University*, 1 *Gale & Dowl.* 100, *et supra*).

Issue in suit not necessary before prohibition.

Court will not presume Ecclesiastical Court will decide wrongly.

Where the Spiritual Court has no jurisdiction, a prohibition may be granted upon the request of a stranger, as well as upon that of the defendant himself; because they deal in that which appertaineth not to their jurisdiction, (2 *Inst.* 607). But no one is entitled to a prohibition, unless he

Suit at request of a stranger.

is in danger of being injured by some suit actually depending, and therefore for a mere petition to the archbishop, or the Ecclesiastical judge, no prohibition *quia timet* lies, (*Bac. Abr. Prohib.*" (C)).

Prohibition after sentence.

A prohibition is granted after sentence.

When no jurisdiction.

1stly, Where there is a defect in the original jurisdiction, (*i. e.*) where the Court has not jurisdiction over the subject matter; whether the defect appears upon the pleadings, or proceedings, or is brought to the notice of the Court collaterally by affidavits, for a party never comes too late where there was an original want of jurisdiction.

General jurisdiction.

2ndly, Where, though there is a general jurisdiction, it can be shown from the proceedings in the Spiritual Court, that such Court has proceeded in a way which the law does not warrant, either in the

Extent of the inquiry.

In handling of temporal incidents.

In the construction of acts of Parliament, (*supra*, p. 198, *Rogers's Eccl. Law*, 749).

If there be a general jurisdiction over the suit, the defect of the jurisdiction must appear upon the face of the pleadings.

Refusal of proof allowed by temporal Court.

For refusing such proof as the temporal Courts would allow, in any temporal matter which becomes incident to a suit within their cognizance, is ground for prohibition after sentence; but after sentence, it does not go on suggestion of

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matter which does not appear by the libel, (*Com. Dig.* "*Prohib.*" (D)).

If the Spiritual Court extends its jurisdiction beyond the point to which it should extend, prohibition may lie after sentence; as where churchwarden was compelled to deliver his accounts, and the Court proceeded to decide upon the propriety of the charges contained therein, (*Leman* v. *Goulty*, 4 *T. R.* 3). Where the Spiritual Court has jurisdiction over some of the matters charged on the libel, though there be others over which their jurisdiction is doubtful. After sentence it must be expressly proved, in order to obtain prohibition, that the Court proceeded upon the articles over which they had no jurisdiction; otherwise it will be presumed the Court acquitted upon those charges, over which they had no jurisdiction, (*Hart* v. *Marsh*, 5 *Add. & Ell.* 602).

Defect of trial.

Where the ground of prohibition is not *pro defectu jurisdictionis*, but *pro defectu triationis*, the objection must be taken before final sentence; and a party neglecting to contest the jurisdiction in the first instance, and taking his chance of a favorable decree shall not be allowed after sentence to allege the want of jurisdiction, to try as the ground of a prohibition, unless the defect appears upon the pleadings, (*Rog. Eccl. Law*, 751).

Lord *Mansfield* said, "If a party comes for a prohibition before sentence, this Court will grant

it for the sake of the trial: he is afterwards too late." (*Full* v. *Hutchins, Cowp.* 424).

So in the case of *The Churchwardens of Market Bosworth* v. *The Rector of Market Bosworth*, 1 Lord *Raym.* 435. The libel was founded on a custom which was denied, and the decree was against the custom; application for prohibition was that custom or no custom is triable at law, but the Court held that the plaintiffs grounded their libel upon a custom which would have been well grounded, had it not been denied: if they submit to the trial, and the custom is found against them, prohibition shall not go, for the design was only to excuse the costs.

Custom or no custom.

Disobedience of a prohibition.

Disobedience of a prohibition is a contempt of the superior Court that awards it, and is punishable by attachment, which issues against the Judge, and the party for proceeding; and for which they are subject to fine, and imprisonment (*F. N. B.* 40). Such attachment may be awarded against a peer; (*Bac. Abr.* "*Prohibition*" (M). Proceeding after the writ is delivered, is a contempt, but still it is a matter examinable whether the Court has jurisdiction, or not. If it has not, the Court will prohibit finally, and give satisfaction; if the Court has jurisdiction, the party is not to have damages, but if they have not, it has acted against the prohibition of the law, and done the party wrong. If a new suit be instituted for the same thing, an attachment lies (*Leon.* 111).

Prohibition cannot issue to the King, (5 *Neville & Man.* 147).

A prohibition is intended for keeping every Court within its proper jurisdiction, and the law as to prohibitions can only be changed by act of Parliament, (*Com. Dig.* "*Prohib.*" (C)).

Disturbance, prohibition.

A. was sued in the Spiritual Court for disturbing a person in his seat at Church, and suggested for a prohibition that he purchased an ancient house in the parish, with the seat in question, to him and his heirs, which was pleaded below. (*Per curiam*) This is enough to show that the temporal right is in question, prohibition was awarded, (1 *Wilson*, 17).

For prohibition, surmise that A. was seised of the manor of B., and that he and those whose estates he had, had used, time out of mind, to have a peculiar pew in the body of the Church, and that defendant by suit in the Ecclesiastical Court sought to dispossess them, (*Boothby* v. *Bailey*, *Hob. Reports*, 69). Held no sufficient ground of prohibition, though the freehold of the Church, &c., is in the parson, the use, and repair is common to all the parishioners. And for avoiding of confusion, the distribution and disposing of seats and charges of repair belong to the ordinary, and therefore no man can challenge a peculiar seat without special reason. If it had been prescribed that A., time out of mind, at his only cost did maintain the pew, and had the sole use of it,

the prescription might have stood, and been a warrant for a prohibition, though the pew was in the body of the Church. And so it is in the case of an aisle, or chapel adjoining to the body of the Church, whether it has been maintained by the whole parish, or by particular persons.

A Court of common law is not bound to wait until a suit is actually at issue in the Spiritual Court, but where it is fairly to be seen that the Spiritual Court is really progressing towards the trial of a question over which it has no jurisdiction, a Court of common law is at liberty to interfere by a writ of prohibition, and remove the cause before a proper tribunal. (*Byerly and Windus*, 7 *Dowl. & Ry.* 595, *et seq.*).

When prohibition may be awarded.

Declaration in prohibition, right to.

A party has a right to declare in prohibition, and the Court will assume, that if the defendant finds that he is wrong, he will submit, and refuse the declaration, and then the Court will, on his application, stay the proceedings. (Lord *Denman*, C. J.).

It is not quite clear that the Court could prevent a declaration in prohibition, because, if we made a rule absolute, and the defendant proceeded afterwards, the other party would have recourse to a declaration in prohibition, which, before 1 Wm. 4, c. 21, was a *qui tam* declaration, for it supposed a contempt, for proceeding after the writ had been delivered, (*Coleridge*, J.,

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supra, p. 197; *Regina* v. *The Judge of the Episcopal and Consistorial Court of the Bishop of Lincoln: Rennington and Another* v. *Dalby*, 8 *Jurist*, 1135).

The case of *Burder* v. *Veley*, (12 *Adol. & Ellis*, 233), when the above was argued, was relied upon by Mr. *Kelly*, counsel for the defendant, (in prohibition).

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APPENDIX.

IN THE EXCHEQUER OF PLEAS.

LOUSLEY *v.* HAYWARD and Another (*a*).

(1 *Young & Jervis's Reports*, p. 583).

A pew in the *body* of a Church may be prescribed for as appurtenant to a house out of the parish.

CASE for disturbing the plaintiff in the possession of his pew. At the trial at *Gloucester*, before *Lawrence*, J., the right to the pew was claimed by the plaintiff, on the ground of reparation and enjoyment for a considerable length of time. The pew was situated in the body of the Church, and the house, in respect of which the plaintiff was, as he contended, entitled, was not within the parish. A verdict was found for the plaintiff; and at the trial, Mr. Justice *Lawrence*, in answer to an observation made, that a prescription might, under such circumstances, be good for a pew in the aisle, but not in the body of the Church, said, he saw no substantial distinction.

A motion was made to set aside the verdict, on the ground of this distinction; and also, that the

(*a*) This case is reported, almost *verbatim*, from notes taken by the late Mr. *Dauncey*. The MS. is in the possession of Mr. Serjeant *Ludlow*, to whose kindness the Editors are indebted for the means of submitting an important decision to the attention of the Profession.

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right, either by prescription or faculty, could only be appurtenant to a messuage *in the parish*.

On the part of the plaintiff it was urged, that a seat in the nave, or the body of the Church, might be prescribed for as belonging to a house, or in the aisle, though by an inhabitant of another parish. 1 *Gibs. Cod.* (*b*); 2 *Rol. Abr.* (*c*); and *Davis* v. *Witts* (*d*), were cited.

That there was nothing expressly confining the claim in the body of the Church to houses within the parish, and no substantial distinction between that and the aisle, reparation being the ground of the right, which equally benefitted the parish, which was bound otherwise to repair, whether it was performed by the parochial or extra-parochial claimant. A parishioner has no exclusive right to a seat in the body of the Church, but only by prescription grounded on reparation, and that as annexed to a house, which an extra-parochial claimant may have in the aisle. *Davis* v. *Witts*. In *Barrow* v. *Kew* (*e*), a prescription for a seat by an inhabitant of another parish was held ill, unless he prescribe for the aisle, or *pro sedile*, or shew that *he used to repair*, which after verdict would be intended. If this were a contest with the ordinary, stricter evidence might be required, but, as against a wrong doer, enough is proved. *Gibs. Cod.* (*f*); *Kenrick* v. *Taylor* (*g*).

(*b*) p. 197, Ed. 1761.
(*c*) p. 288.
(*d*) Forrest, 14.
(*e*) 2 Keb. 342.
(*f*) p. 222.
(*g*) 1 Wils. 326.

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In *Stocks* v. *Booth* (*h*), the words "a house in the parish," were only used by *Buller*, J., because the fact was so in that case. By common right the parson impropriate, and by consequence his farmer, ought to have the chief seat in the chancel, because he ought to repair it; but by prescription another person may have it. *Hall* v. *Ellis* (*i*). It is true that the land is chargeable for the reparation of the body of the Church, but that affords no argument why a foreigner, proving prescription and reparation, may not have particular privileges. The parishioners are, unless the contrary can be shewn, liable to repair the aisle; *Frances* v. *Ley* (*k*); and if so, and the ordinary can appoint to both body and aisle, why should not reparation by a foreigner give the right in each? No distinction is made in the form of the license to erect pews in a chancel for the "better sort" of the parishioners, between the body and the aisle, the language being, "whereby others may be the better placed in the body and aisle of the Church." 2 *Gibs. Cod.* (*l*). And so in note 17 of section 4, "*processus in causâ sedilis*," the decree is, "that the pew, which was built by, &c. shall continue and stand still for, &c. whensoever they shall please either to inhabit in the parish, or to come to the Church there." So again, in the same work (*m*), the following form is given: "*Licentia familiæ ad frequentandam aliam ecclesiam quam suam parochialem, ratione vicinitatis;*" then

(*h*) 1 T. R. 428.
(*i*) Noy's Rep. 133; Buls. 151.
(*k*) Cro. Jac. 366.
(*l*) p. 1464.
(*m*) p. 1468.

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why not by prescription and reputation proved by a foreigner?

The Lord Chief Baron (n) in giving judgment said:—The only question which the Court has to decide is, whether there can in law be a prescription for a person living out of the parish to have a pew in the nave of the Church. There is, in the present case, an uninterrupted enjoyment; and although the origin of the right to the pew cannot be traced, it is undoubtedly ancient, notwithstanding there is nothing to shew upon what circumstances it was at first assumed or grounded. And in the absence of all evidence against the right, the question is whether, upon the mere principles of law, the Court can say, that, notwithstanding the enjoyment of the right in fact, it could never have had a legal origin.

To defeat the claim of the plaintiff, it must be shewn that the creation or assumption of the right was absolutely, and of necessity, void *in origine*; and unless the prescription is of itself rotten and bad from some legal vice, there is nothing else to affect it. But as to the legal possibility or impossibility of the thing, a very short inquiry is sufficient. It appears from *Selden* (o), that in early times, by the Pope's license, Churches were founded or built by Lords of Manors, or other lay founders; and that parishes were not then reduced to the exact circuits and boundaries by which they are now known, and particularly for ecclesiastical purposes; that when Churches were first built, a certain district was allotted, over which the officiating minister

(n) Macdonald.

(o) Vol. 3, pt. 2, p. 1121-2, edit. 1725.

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was to superintend (*p*). This was a kind of division, not a parish, in the sense in which we now understand it. The boundaries of parishes were settled long after the foundation of Churches; and those ecclesiastical districts, formerly belonging to Churches at their first institution, have been since much varied, and in many cases abridged and narrowed, when new Churches were built (*q*). How, then, can we now say that the owners of the house or the estate in respect of which this pew is claimed, did not build or endow the Church, or some part of it; or that this house, though now not within the parish, according to its present boundaries, was not formerly within the ecclesiastical limits of the Church? Very probably it was so. But without going farther, it might have been so, and that is sufficient; for we are now only upon the question, whether a person can, for a house out of the parish, prescribe for a pew in the body of the Church, or whether the prescription must of necessity be bad in law. The history of Churches shews the contrary. The distinction between a prescription in a house out of the parish for a pew in an aisle, but not in the body of the Church, is merely made a doubt or question in some of the books; but there is no case in support of it; and there is no distinction in the reason of the thing itself.

The rule was discharged (*r*).

(*p*) Selden, vol. 3, pt. 2, p. 1120, 1206.

(*q*) Id. p. 1212, 1213.

(*r*) See the case of *Byerley* v. *Windus*, 7 D. & R. 564; S. C., 5 B. & C. 1; *Pym* v. *Gorwin*, Moore, 878.

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DECLARATION IN CASE FOR DISTURBANCE OF A PEW RIGHT.

In the, &c.

The —— day of ——, A. D. ——.

——— (*a*) To wit, &c. For that whereas the plaintiff before and at the time of the committing by the defendant of the grievance hereinafter mentioned was and from thence hitherto hath been and still is lawfully possessed of a certain messuage or dwelling-house with the appurtenances situate in the parish of A. B., in the county of C. D. (*b*), and during all the time aforesaid did and still doth with his family inhabit and dwell therein, by reason whereof the plaintiff during all the time aforesaid had and still of right ought to have for himself and his said family so inhabiting and dwelling in the said messuage or dwelling-house with the appurtenances as aforesaid, and as to the said messuage or dwelling-house with the appurtenances belonging, appertaining, and appurtenant, the sole use, occupation, possession, and enjoyment of a certain pew in the parish Church of the said parish of A. B. for him and them to hear and attend the celebration of Divine Service in the said parish Church at his and their free will and pleasure, yet the defendant well knowing the premises, but intending to injure the plaintiff and to deprive him and his said family of the sole use, occupation, possession, and enjoyment of the said pew, did, whilst the plaintiff and

(*a*) The venue is local.

(*b*) Should be the same county as the venue.

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his said family so inhabited and dwelt in the said messuage or dwelling-house with the appurtenances, and was so entitled to the sole use, occupation, possession, and enjoyment of the said pew as aforesaid, and before the commencement of this suit, to wit, on the —— day of ——, A. D. —— (*c*), and on divers other days and times afterwards unlawfully (and without the leave or license and against the will of the plaintiff) enter into and continue within the said pew during the celebration of Divine Service in the said Church, and thereby greatly disturbed and hindered the plaintiff in the use, occupation, possession, and enjoyment thereof, and also thereby then unlawfully prevented and hindered the plaintiff by himself and his said family so inhabiting and dwelling in the said messuage and dwelling-house with the appurtenances as aforesaid, from sitting in the said pew, and from having the sole use, occupation, possession, and enjoyment thereof, in so full and ample and beneficial a manner as he otherwise might and would and ought to have done, and thereby then otherwise greatly disturbed and molested the plaintiff by himself and his said family in the use, occupation, possession, and enjoyment thereof. To the plaintiff's damage, &c. (*d*)

(*c*) About the day the disturbance was committed.

(*d*) When the faculty is to a man and his family so long as he resides within the parish, (*supra*). In such case, the right is not appurtenant to any PARTICULAR messuage, but exists so long as he to whom the grant is made is resident within such parish. A count to meet such a state of facts may be easily framed from the above.

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DECLARATION IN CASE AGAINST THE ORDINARY FOR DISTURBANCE OF A PEW RIGHT BY PRESCRIPTION.

In the, &c.

The —— day of —— A.D. 1845.

Middlesex to wit. (*a*) For that whereas the defendant heretofore, to wit, on the —— day of —— A.D. —— (*b*) and long before was, and from thence hitherto hath been and still is, by Divine Providence, Lord Bishop of the diocese of ——, and by virtue of the said rank, office, and dignity, he did during all the time aforesaid, and on the day and year aforesaid, exercise the office and duties of, and then was, and is the ordinary of the parish Church of —— in the county of —— (*c*) within the said diocese. And whereas also the plaintiff before and at the time of the committing by the defendant, as such ordinary as aforesaid, of the grievance hereinafter mentioned, was, and from thence hitherto hath been and still is seised in his demesne, as of fee, of and in a certain ancient messuage or dwelling-house and premises, with the appurtenances, situate in the parish, county, and diocese aforesaid, and therein with his family during all the time aforesaid did and still doth inhabit and dwell and by reason thereof the plaintiff, and all those whose estate he now hath during all the time aforesaid and at the time of the committing by the defendant of the said grievance hereinafter mentioned, had as to the said ancient messuage or

(*a*) The venue is local.

(*b*) The day of the disturbance, or about it.

(*c*) Same county as venue.

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dwelling-house and premises, with the appurtenances belonging, appertaining, and appurtenant from time whereof the memory of man is not to the contrary, and still of right ought to have for himself and themselves, and his and their family, respectively inhabiting and dwelling in the said ancient messuage or tenement and premises with the appurtenances, the sole use, occupation, possession, and enjoyment of a certain pew in the parish Church of —— aforesaid, to hear and attend the celebration of Divine Service therein at his and their free will and pleasure, and by reason of such sole use, occupation, possession, and enjoyment as aforesaid, the plaintiff and all those whose estate he now hath, as aforesaid, from time whereof the memory of man is not to the contrary, has and have repaired and maintained, and have been used and accustomed, and still of right ought to repair and maintain the said pew, when and as often as it should be necessary, at his and their own proper costs and charges, for the sole use, benefit, and convenience, for the purpose aforesaid, of himself and themselves and his and their families, so inhabiting and dwelling in the said ancient messuage or dwelling-house and premises, with the appurtenances. Yet the defendant as such ordinary as aforesaid, well knowing the premises, but intending unlawfully to injure the plaintiff and to deprive him, whilst the plaintiff was so seised of the said ancient messuage or dwelling-house and premises, with the appurtenances as aforesaid, and inhabited and dwelt therein of the said use, occupation, possession, and enjoyment of

the said pew, to which he was so entitled as aforesaid heretofore, to wit, on the —— day of ——, aforesaid (*c*), and on divers other days and times afterwards between that day and the commencement of this suit, unlawfully and without the leave or license and against the will of the plaintiff entered and caused and procured divers other persons to enter into and continue in the said pew during the celebration of Divine Service in the said Church, and thereby greatly disturbed the plaintiff in, and thereby hindered him and prevented him from having the sole use, occupation, possession, and enjoyment thereof, in so full and ample a manner as he ought and otherwise might and would have done, whereby the plaintiff could not, during the time aforesaid, have the sole use, occupation, possession, and enjoyment, of the said pew for himself and his family so inhabiting and dwelling in the said ancient messuage or dwelling-house and premises, with the appurtenances as aforesaid, in so ample and beneficial a manner, as he otherwise might and ought to do and would have done; and thereby then otherwise greatly disturbed and molested the plaintiff in the use and enjoyment thereof. To, &c.

(*c*) Day of disturbance, or about it.

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SCOTCH LAW.

A short digest of the law relating to pews in Scotland, has been appended, because it was presumed it would be interesting, if not from its positive use, at all events from the peculiarity of its construction.

The area of a Church is generally divided according to the rules which regulate the expense of building it, and whether any of the heritors or their tenants be dissenters or not, it makes no difference in the allotment, or the burden of the expense.

In purely Landward parishes, the area is divided among the heritors according to their value, or it might be their real rents. Each heritor is entitled to a pew for his family, corresponding to his rent, but the priority of choice amongst the heritors is determined by their valuations—the highest valuation being entitled to the first choice, and so on. After the family seats are all chosen, each heritor is entitled to a share of the remainder of the area; but the allotted portions of the Church do not become the private property of the heritors, they are merely pertinent to his lands for the accommodation of his family, &c., and the right to them passes by a disposition of the lands, though no mention of them be made, for they cannot be separated from the lands to which they are pertinent. If a part of the estate is sold, the purchaser is entitled to a rateable proportion of the allotment. If there was a common possession of the whole of the area by the owners and tenants of

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an estate, several parts of which had been sold, it must continue so, until the area be divided according to the several rights of the parties.

The patron of the Church is entitled to a family seat for himself, and in the choice of which he has a preference before *any* of the heritors—if he be a heritor as well, he would not be entitled to more than one family seat, though he might to such a portion of the area, distinct from the family seat, as would be equal to the extent of his property as heritor.

The minister of the parish is also entitled to a pew for his family, as near the pulpit as possible.

Some seats, generally those which occupy the place of the communion table, are appointed for the poor.

The right of occupying the family seat is exclusive, and if the heritor did not occupy it himself, he probably would be entitled to let it, or communicate the right of sitting therein to any person he pleased, certainly if he be a heritor or inhabitant of the parish: over the other part of the area he has not the same power; his tenants are entitled to sittings therein without payment of rent for the same, and he cannot let to their exclusion. Generally, all the persons dwelling upon the heritor's lands are entitled to sit in the area, whether they be tenants or sub-tenants; and if the area allotted be insufficient to accommodate them, the heritor has no right to appoint, but they who first present themselves have a right to the sittings.

The property in the materials of the pew continues in the heritor, and he may sell them, though he cannot alienate the part of the area upon which it is built.

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When the parish is partly Burgh and partly a Landward district, then the expense of building the Church is borne by the fuars and heritors jointly, and the area is allotted accordingly. (It has been held, that where the area has been, by immemorial usage, possessed in definite proportions by the town and the landward heritors, that such state of possession could not be disturbed; but it is said, that whether such an effect would be given to the usage is more than doubtful). In cases where the community of a Burgh are to have a share allotted, they are entitled to a seat for their magistrates.

In Burgh Churches, or where the parish is partly Burghal and partly Landward, in that part of the Church which appertains to the Burgh, the magistrates may levy rent for certain limited purposes (if the practice be sanctioned by immemorial usage). They must not make it a source of profit for the general good of the Burgh, but must exclusively confine it to the maintenance of the fabric of the Church, and the defraying of the expenses of the public ordinance, (if not otherwise provided for by law), including the stipend of the minister, where no tiends or other local taxes are appointed for the purpose: for any other purpose, no length of possession could give the right to levy a rental upon the seats.

In Landward parishes, or the landward part of Burghal and Landward parishes, the heritors have no right to levy rent, even if the proceeds are to be appropriated for ecclesiastical purposes. The distinction seems to be, that in Landward parishes the stipend of the minister is provided for out of the

tiends, and by law the heritors were burthened with the maintenance of the Church. The magistracy of the Burghs were not liable for the stipend of the minister, and have no definite means secured for "operating their relief" from the burthen of upholding the fabric of the Church, and therefore acquire the right to charge rents for that purpose by prescription. If a Burgh be divided into several parishes, the whole (with respect to the expenses being paid out of the seats), must be treated as one parish, and the levy must be made as for one common fund for defraying the expenses.

The magistrates of a Burgh, if timely challenged, could not sell or dispose of the seats allotted to the Burgh.

The sheriff is the proper Judge, in the first instance, to determine the appropriation of the seats, but in a case wherein the Kirk Sessions had for a long period been allowed to act as managers of the parish, and to dispose of the seats, the Courts recognised their power to pew out a part of the area, and bind the heritors by their agreements.

The subject is brought before the sheriff in a suit, termed a process of division, which may be insisted upon by a single heritor, in which case the sheriff determines any disputes, and finally decrees, subject to the Court of Sessions for a revision, if necessary.

If all the heritors agree, they can make a valid division without the help of the judicature; but any heritor not consenting may afterwards challenge it, and insist upon a process for a division: but if a certain state of things has existed for a long period, though there be no evidence, a regular

division will be presumed; but if there be no grounds for presuming such division, though it has been persisted in for a period of forty years, it will not so fix the right as to exclude a legal division.

Such are the usual rules which apply to the pews in Scotland: there are some few exceptions which particular cases have introduced; as where on the rebuilding a Church the parish agrees with the proprietor of an aisle to allot him a portion in the new Church, equal in extent to the aisle, and though there was no judicial division of the area, the agreement of the heritors was held to be sufficient, and in the interlocutor of the Lord Ordinary the propriety of the division of the heritors was recognised.

So also in the division of the Cathedral Church of St. Andrews, the Court appear to have recognised the rights of the Crown and of the University to a certain extent of the area, and which recognition was upon the ground of long user.

So also in the case of North Leith, they recognised private rights of this nature in favour of certain incorporations of the Canongate of Edinburgh and the Trinity House at Leith, neither of which had any legal residence or property in the parish, and contributed nothing towards the rebuilding the Church, except so far as they might be considered to have a property in the site and materials of the old Church: the right in case of the incorporations, &c., arose from the grant of a Chapel, on the site of which the parish Church was built. On the part of the Trinity House, by the grant of a part of the old area by the Kirk Sessions

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to them, as the managers of the parish. This decision stands alone, being governed by peculiar circumstances.

If a heritor sells his seats in lots, he would have the power of attaching the family seat to one of the lots.

If by prescription and possession under a conveyance, private individuals be held to have acquired a right to particular seats, they may convey, or let them to others, but such alienation cannot be to strangers, to the exclusion of the inhabitants of the parish.

Where the magistrates of a Burgh of Barony agree with certain inhabitants on payment of a low rent for ten years in advance, to grant tacks of those seats for such time as will repay the advance with interest; and which tacks were to be assignable under certain conditions; and when such tacks came to an end, the subscribers and assignees should be entitled to such seats at such rents; where for more than forty years after the expiration of the period granted, the magistrates allowed the seats to be so possessed, the Court held that the magistrates could raise the rent of all such seats as were not belonging to the original subscribers, or unless the holders had succeeded to, or obtained assignment from them prior to the "expiry" of the tacks by the repayment of the subscriptions.

So where three pews had been disposed of by the magistrates of a Burgh to a person, his heirs, executors, and others, his nearest representatives, whatsoever, resident in the parish, it was held, that where there were three representatives, one daughter

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of the whole blood and two of the half blood, that each would take a pew. One of the pews being sufficient for the necessities of the family of the daughter of the whole blood.

This digest has been principally arranged from a work upon the Parish Law of Scotland, by Mr. Dunlop.

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STATUTES.

AUGMENTATION.

1 Geo. 1, c. 10.

2 Ann, c. 11. 5 Ann, c. 24. 7 Ann, c. 27. The bishops shall inform themselves of the yearly value of every benefice, &c.

"Whereas it is necessary for the governors of the bounty of Queen Anne, for the augmentation of the maintenance of the poor clergy, in order to the more regular making proper augmentations, to be informed, as exactly as may be, of the clear improved yearly value of the maintenance of all such parsons, vicars, curates, and ministers, officiating in any church or chapel within that part of Great Britain called England, the dominion of Wales, or town of Berwick-upon-Tweed, where the Liturgy, and rites of the Church of England, as now by law established, are or shall be used and observed, whose maintenance is intended to be augmented."

"IV. And whereas her said late Majesty's royal bounty to the poor clergy was intended to extend, not only to parsons and vicars who come in by presentation or collation, institution, and induction, but likewise to such ministers who come in by donation, or are only stipendiary preachers or curates, officiating in any Church or Chapel where the Liturgy and rites of the Church of England, is now by law established, are and shall be used and observed, most of which are not corporations, nor have a legal succession, and, therefore, are incapable of taking a grant or conveyance of such perpetual augmentation as is agreeable to her said late Majesty's gracious intentions, and in many places it would be in the power of the impropriator, donor, parson, or vicar, to withdraw the allowance now or heretofore paid to the curate or minister serving the cure, or, in

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case of a Chapelry, the incumbent of the mother Church might refuse to employ a curate, or permit a minister duly nominated or licensed to officiate in such augmented Chapel, and might officiate there himself, and take the benefit of the augmentation, though his living be above the value of those which are intended to be first augmented; and the maintenance of the curate or minister would thus be sunk instead of being augmented:" Be it therefore enacted by the authority aforesaid, that all such Churches, curacies, or Chapels, which shall at any time hereafter be augmented by the governors of the bounty of Queen Anne for the augmentation of the maintenance of the poor clergy, shall be, and are hereby declared and established to be, from the time of such augmentations, perpetual cures, and benefices, and the ministers duly nominated and licensed thereunto, and their successors respectively, shall be, and be esteemed in law, bodies politic and corporate, and shall have perpetual succession by such name and names as in the grant of such augmentation shall be mentioned, and shall have a legal capacity, and are hereby enabled to take, in perpetuity, to them and their successors, all such lands, tenements, tithes, and hereditaments, as shall be granted unto or purchased for them respectively by the said governors of the bounty of Queen Anne for the augmentation of the maintenance of the poor clergy, or other persons contributing with the said governors as benefactors; any law or statute to the contrary notwithstanding: And that the impropriators or patrons of any augmented Churches or donatives, for the time being, and their heirs, and the rectors and vicars of the mother Churches whereto any such augmented curacy or Chapel doth appertain, and their successors, shall be and are hereby utterly excluded from having or receiving, directly, or indirectly, any profit or benefit by such augmentation and shall from time to time, and at all times, from and after such augmentation, pay and allow to the

All augmented Churches, &c., shall be perpetual benefices.

and the ministers shall be bodies politic,

and shall be enabled to take in perpetuity such lands, &c.

Impropriators, &c., of augmented Churches, &c., and the rectors, &c., of the mother Churches, are excluded from the benefit of such augmentation, and shall

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allow the usual pensions, &c., to the ministers officiating.

ministers officiating in any such augmented Church and Chapel respectively, such annual and other pensions, salaries, and allowances, which by ancient custom, or otherwise, of right, and not of bounty, ought to be by them respectively paid and allowed, and which they might, by due course of law, before the making of this Act, have been compelled to pay or allow to the respective ministers officiating there, and such other yearly sum or allowance as shall be agreed upon (if any shall be) between the said governors and such patron or impropriator, upon making the augmentation, and the same are and shall be hereby perfectly vested in the ministers officiating in such augmented Church or Chapel respectively, and their respective successors.

No rectors, &c., of mother Churches to be discharged from cure of souls.

V. Provided always, That no such rector or vicar of such mother Church, or any other ecclesiastical person or persons, having cure of souls, within the parish or place where such augmented Church or Chapel shall be situate, or his or their successors, shall hereby be divested or discharged from the same; but the cure of souls, with all other parochial rights and duties, (such augmentation and allowances to the augmented Church or Chapel, as aforesaid, only excepted) shall hereafter be and remain in the same state, plight and manner as before the making of this Act, and as if this Act had not been made.

Augmented cures remaining void six months, shall lapse to the bishop, &c.

"VI. And for continuing the succession in such augmented cures, hereby made perpetual cures and benefices, and that the same may be duly and constantly served:" Be it enacted by the authority aforesaid, that in case such augmented cures be suffered to remain void by the space of six months, without any nomination within that time of a fit person to serve the same (by the person or persons having the right of nomination thereunto) to the bishop or other ordinary, within that time, to be licensed for

that purpose, the same shall lapse to the bishop or other ordinary, and from him to the metropolitan, and from the metropolitan to the crown, according to the course of law used in cases of presentative livings and benefices, and the right of nomination to such augmented cure may be granted on recovered, and the incumbency thereof may and shall cease and be determined, in like manner, and by the like methods, as the presentation to, or incumbency in any vicarage presentative may be now respectively granted, recovered, or determined.

XIV. And be it further enacted by the authority aforesaid, that all such donatives which are now exempt from all ecclesiastical jurisdiction, and shall be augmented by virtue of the powers given by this Act, shall be subject to the visitation and jurisdiction of the bishop of the diocese wherein such donative is to all intents and purposes of law whatsoever. Augmented donatives to be visited by the bishop.

XV. Provided always, That no donative shall be augmented without the consent of the patron or patrons in writing, under his or their hands and seals first had and obtained.

AUGMENTED CHAPEL TO BE A BENEFICE.

36 Geo. 3, c. 83.

III. "And whereas by an Act, passed in the first year of his late most gracious Majesty King George the First, it was enacted, That all Churches, Curacies, and Chapels, which should be augmented by the governors of the late Queen Anne's bounty, should be from thenceforth perpetual cures and benefices: And whereas it is expedient that such augmented 1 Geo. 1, stat. 2, c. 10

Churches, Curacies, and Chapels should be subjected to the same rules as benefices, with respect to the avoidance of other benefices;" be it further enacted, That such augmented Churches, Curacies, and Chapels shall be considered in law as benefices presentative, so as that the license thereto shall operate in the same manner as institution to such benefices, and shall render voidable other livings, in like manner as institution to the said benefices; and that it shall be lawful for the bishop or ordinary, within whose jurisdiction such augmented Church, Curacy, or Chapel shall lie, to appoint, under his hand and seal, any stipend or allowance for the officiating curate to be nominated or employed by the perpetual curate, or incumbent thereof, not exceeding seventy-five pounds *per annum*, for which payment the said curate shall have the same and like remedies as are hereinbefore given to the curates of rectors and vicars.

Churches augmented by Queen Anne's bounty, to be deemed benefices presentative, and the officiating curate may have a like stipend.

STATUTES RELATING TO PEWS.

58 Geo. 3, c. 45.

Whereas the population of Great Britain, and more particularly in the Metropolis and its vicinity, and in other cities and great towns, has greatly increased, and the Churches and Chapels now existing in the Metropolis and its vicinity, and in many great and populous parishes and extra-parochial places, are inadequate to the accommodation of the inhabitants thereof: And whereas it is therefore necessary that such evil should be remedied, and that additional Churches and Chapels for the celebration of divine service according to the rites of the united Church of England and Ireland as by law established should be erected and maintained

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in such parishes and places, and that a certain number of free seats should be made therein.

XVIII. Provided always, and be it further enacted, That during the incumbency of the existing incumbent of any such parish every new Church therein built, purchased, assigned, or provided as the intended parish Church of any division intended to become and be a distinct parish shall remain a Chapel of Ease, and shall be served, during the incumbency of such incumbent of the original parish, by a curate to be nominated by such incumbent, and licensed by the bishop of the diocese, and paid in manner hereinafter directed.

New Churches of divided parishes to remain Chapels of Ease during the existing Incumbency.

XIX. And be it further enacted, That every such distinct and separate parish as aforesaid shall, when such division as aforesaid shall become complete by the death, resignation, or other avoidance of the existing incumbent of the original parish, be deemed either a rectory, vicarage, donative, or perpetual curacy, and the spiritual person serving the same the rector, vicar, or perpetual curate thereof, or person having cure of souls therein, according to the nature of the original Church of the parish so divided, and shall be for ever thereafter subject to the laws, provisions, and regulations, as to presentation and appointment, and as to institution, collation, induction, or license, and to all such jurisdiction of the bishop, or other jurisdiction, and to holding benefices, as are by law applicable to the original parish.

New Churches, when division complete, to be rectories, vicarages, or perpetual curacies, like original parish.

XX. Provided always, and be it enacted, That all such donatives and perpetual curacies shall be subject to lapse as benefices, if no appointment of a spiritual person thereto shall be made within six months after any death, resignation, removal, or other avoidance of the incumbents thereof respectively: Provided also, that no spiritual person

Donatives to lapse, if no appointment made in six months.

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appointed to any such donative or perpetual curacy shall be removable at the pleasure of any person or body corporate or politic, having the power of appointment thereto.

Pews to be provided for minister, &c., and free seats for poor persons.

LXXV. And be it further enacted, That before the consecration of any Church or Chapel under the provisions of this Act, a seat or pew sufficient to hold six persons at least shall be set apart in the body or ground floor of the Church or Chapel, and contiguous or near to the pulpit, for the use of the minister of the Church or Chapel for the time being and his family; and other seats in some other convenient part of the Church or Chapel, not among the free seats, capable of containing not less than four persons, shall also in like manner be set apart for the use of the minister's servants; and that pews, sittings, or benches in every such Church or Chapel, to be marked with the words "free seats," amounting in the whole to not less than one-fifth part of the whole of the sittings in every such Church or Chapel which shall be built, either wholly or in part, out of any rates, or with any money raised upon the credit of any rates of the parish or extra-parochial place, shall also be appropriated and set apart for the use of poor persons resorting thereto for ever; upon which pews so to be set apart for the minister, his family and servants, and the pews, sittings, or benches so appropriated for the use of the poor, no rent or assessment whatsoever shall at any time be charged or imposed.

No rent, &c., on the pews of minister and poor persons.

Choice of pews by subscribers.

LXXVI. And be it further enacted, That all subscribers, being parishioners to any Church or Chapel built under the authority of this Act, shall have choice of pews at the rates fixed by the commissioners under the provisions of this Act, in the order of their amount of subscription; and as to subscribers of the same amount, in the order of their subscription.

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LXXVII. And be it further enacted, That all the pews or seats in every such Church or Chapel (save and except the pews or seats particularly set down as free seats) shall for ever be charged and chargeable with the several and respective yearly rents or sums set opposite to the figures or numbers marked upon each of the said pews or seats, as they shall be particularly numbered and set down in a list or schedule to be made and signed by the commissioners, and annexed to the deed of consecration of every such Church or Chapel; and which said respective yearly rents or sums shall be paid by the possessors and occupiers of the pews or seats to the persons who shall from time to time be appointed the churchwardens of the said Church or Chapel, by two equal half-yearly payments in each year, namely, on the Monday next after the nativity of our Saviour Christ, and the nativity of Saint John the Baptist, in the vestry room of the Church or Chapel, between the hours of nine in the forenoon and four in the afternoon.

Pews to be let to raise the sum required for Ministers' salaries, &c.

LXXVIII. Provided always, and be it further enacted, That it shall be lawful for the churchwardens of any such Church or Chapel, at any time thereafter, with the consent in writing of the incumbent and of the patron of the Church or Chapel respectively for the time being, and of the bishop of the diocese, to alter any such yearly rent or sums; and in any such case a new list or schedule of rents or sums, and the pews or seats upon which the same are respectively charged, shall be signed by the churchwardens, incumbent, patron, and bishop respectively, and shall be deposited with the deed of consecration of the Church or Chapel.

Churchwardens may, with consent of incumbent, patron, and bishop, alter pew rents.

LXXIX. And be it further enacted, That every person or persons possessed of a seat or pew in every such Church or Chapel shall pay the rents charged thereon as aforesaid at two equal half-

For the recovery of pew rents half-yearly.

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yearly payments, to wit, on the Monday next after the Nativity of our Saviour Christ, and the Nativity of Saint John the Baptist, in every year; and in case the rent of any such pew or seat or any part thereof shall happen to be behind and unpaid by the space of three months next after the same shall become due, and notice in writing demanding payment thereof shall have been given to the owner or occupier of such seat or pew, then the said churchwardens for the time being of the Church or Chapel shall and may either enter upon and hold such seat or pew, or let the same to any other person or persons, in such manner as such churchwardens shall think proper, until the rent so in arrear, and all costs and charges which shall have been occasioned by the non-payment or in the recovery thereof, shall be duly paid and satisfied; or otherwise to sell the same pews or seats respectively by public auction to the best bidder, and out of the money thence arising pay and satisfy the said rent in arrear, rendering the overplus (if any), after deducting all reasonable costs and charges occasioned by or in consequence of such rent being in arrear and in the recovery thereof, to the owner or occupier of such pews or seats respectively (as the case may be); or the said churchwardens, at their discretion, may sue for and recover the said rent so in arrear by action of debt or upon the case, for the use and occupation of such pew or seat, to be brought against the owner or owners, or any occupier or occupiers thereof, in the name of "the churchwardens of the Church or Chapel of [describing the Church or Chapel]"; and no such action or suit shall abate by reason of the death, removal, or going out of office of any churchwarden.

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59 Geo. 3, c. 134.

XXXI. "And whereas circumstances may arise in which it may become expedient and necessary to alter the rents at which pews may be let, in any Churches or Chapels built or provided under the provisions of the said recited Act and this Act:" be it therefore further enacted, that it shall be lawful for the Churchwardens and Chapelwardens of any such Church or Chapel, and they are hereby required, when ordered and directed so to do by the bishop of the diocese, with the consent of the patron and incumbent, and in any case in which the pew rents shall have been assigned to the parish, then with the consent of the vestry of the parish, to make such alteration in any such pew rents as shall be directed or approved of, with such consent as aforesaid.

Church and chapelwardens may alter pew rents, by order of bishop, and with consent of patron, &c.

XXXII. And be it further enacted, that it shall not be lawful for the Churchwardens or Chapelwardens of any additional Church or Chapel, to let or sell any pews and seats, except to parishioners, during the time such parishioners shall continue to be inhabitants of the parish; and every sale of any pew or seat shall be subject to such reserved rent as shall have been fixed under the provisions of the said recited Act or this Act, and shall be by private contract, and not by public auction; and all pew rents under the said recited Act and this Act, shall be payable in advance; (that is to say), one year's rent shall be paid on the admission to the pew or seat, if such admission shall be given at Lady Day or Michaelmas, or if at any intermediate period, then the proportion of the half-year to Lady Day or Michaelmas, as the case may be, and a half-year's rent over and above such proportion; and thereafter half-yearly payments shall be made in advance, commencing on the Lady Day or Michaelmas immediately following the taking of such pew; and

Pews to be let to parishioners only, and not sold by auction; rents payable in advance.

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How pew forfeited.

every such pew and seat shall be forfeited, and become vacant by the discontinuance of any such payment in advance for two following half-years; any thing in the said recited Act to the contrary notwithstanding.

How far commissioners may discharge subscribers from payment of pew rents, &c.

XXXIII. And be it further enacted, that it shall be lawful for the commissioners to discharge any subscribers towards building any Church or Chapel, wholly or in any part, from the payment of pew rents in the said Church or Chapel, for a limited time or for life, in such proportion to the amount of their respective subscriptions as the commissioners shall see fit; and to allow any such subscriber, if he shall remove from the parish, to assign the remainder of such term to any other parishioner inhabiting the parish.

Rates may be laid on any parish for rebuilding or enlarging the Church.

XL. And be it further enacted, that when any parish shall be desirous of extending and increasing the accommodation in the parish Church, and it shall be found necessary or expedient to that end to take down the existing Church, and to rebuild the same on the same site, or on a more convenient site, it shall and may be lawful for the churchwardens of any such parish, with the consent of the vestry, or persons possessing the powers of vestry, and with the consent also of the ordinary, patron, incumbent, and lay impropriator, if any such there be, to take down such existing Church, and to rebuild the same upon the same or upon a new site; and the said churchwardens are hereby authorized and empowered to borrow and raise, upon the credit of the Church rates, or any rates made under the said recited Act or this Act, of any such parish, such sum or sums of money as shall be necessary for defraying the expense or any part of the expense of the taking down and rebuilding such Church, and to make rates for the payment of the interest of such sum or sums of money so to be borrowed and raised, and for providing a fund, of

Money may be borrowed upon rates, &c.

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not less than the amount of the interest of the sum advanced, for the repayment of the principal thereof, or for repaying such principal in such manner, and at such times, and in such proportions as shall be agreed upon with the persons advancing any such money: provided always, that no Church shall be so taken down and rebuilt, by means of any rates upon any parish, if such proportion of dissents, as are in this Act specified in relation to any application to build or to enlarge any Church or Chapel, either wholly or in part, by means of rates, are signified in writing in manner directed by this Act; and such Church, when consecrated, shall be to all intents and purposes the parish Church of such parish, for the celebration of Divine Offices, and the solemnization of Marriages, according to the rites and ceremonies of the Church of England: provided always, that one-half of the additional accommodation, which shall be obtained by the rebuilding such Church, shall be set apart for free and open sittings.

No Church taken down, &c., if dissent signified as herein mentioned.

Proviso for free and open sittings.

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3 Geo. 4, c. 72.

XXIII. And be it further enacted, That it shall be lawful for the said commissioners to transfer any rights to any pews, with the consent of the owners thereof, in any existing Church or Chapel, belonging to any person residing in any division of any parish or place in which any new Church or Chapel shall have been or shall be built, acquired, or appropriated under the provisions of the said recited acts, to the Church or Chapel of the division in which any such person or persons shall reside, for the purpose of enabling the said commissioners to make or increase the number of free seats in the Church or Chapel from which such rights shall be transferred; and the persons from whom any pews shall

Commissioners may, with consent of owners, transfer pew rights from existing Churches to new Churches, &c., of divisions, for the purpose of making free seats.

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be so taken for such purpose as aforesaid, and to whom any pews in lieu of their former pews shall be assigned by the said commissioners in any other Church or Chapel, shall have, hold, and enjoy the same respective rights and titles to the pews so assigned, as they respectively had, held, and enjoyed in their former pews, or such right and title as shall be directed and set forth in such assignment in lieu thereof, without any faculty, instrument, or other process than such assignment as aforesaid; and every such assignment shall be registered in the registry of the diocese in which the Church or Chapel shall be, and a duplicate thereof deposited in the chest of the Church or Chapel in which any such pew shall be so assigned as aforesaid; provided always, that no larger or greater or other right shall be given to any pew in any new Church or Chapel, upon any such transfer, than belonged to the owner, proprietor, or occupier of the pews in the existing Church or Chapel, in the pews in respect of which any such transfer shall be made.

No greater right to be given on the transfer of pews.

Regulation as to letting of pews.

XXIV. And be it further enacted, That in every case in which rents shall have been fixed upon the pews in any Church or Chapel under the provision of the said recited acts for the purposes therein specified, notice shall be given for six successive weeks at the end of each year of all the pews which are vacant or which will become vacant at the commencement of the next year, by affixing the same in writing upon the doors of the Church or Chapel and vestry room thereof respectively; and all such pews as shall not be taken at the rent respectively fixed thereon within fourteen days after the commencement of the ensuing year, shall in every such case be let to any inhabitant of any adjoining parishes or places in which there shall not be sufficient accommodation in the Churches and Chapels of the parish or place for the inhabitants thereof, at the rent respectively so affixed upon

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such pews, for any term not exceeding the end of the year; and at the expiration of the year, and also of every succeeding year in which any such pews shall be rented by inhabitants of any adjoining parishes, such pews shall be inserted in the list of vacant pews, to be taken in preference by the inhabitants of the parish or place to which the Church or Chapel shall belong; and all such pews as may not be so taken by any inhabitant of the parish or place, may again be let, and so on from year to year, to any inhabitants of any adjoining parish or place; any thing in the said recited acts to the contrary notwithstanding.

For avoidance of pew leases.

XXV. Provided always, and be it further enacted, That in case any inhabitant to whom any lease or demise of any pew, seat, or sitting in Church or Chapel, of the parish or place or division or district of which he shall be an inhabitant, shall be granted for any longer term than one year, shall cease to be an inhabitant of the said parish, place, division, or district, or shall discontinue his or her attendance at the Church or Chapel for the space of any one year, then and in every such case his, her, or their lease, demise, term, estate, and interest in such pew, seat, or sitting respectively, shall, at the end or expiration of the then current year of the said term or period, cease and determine to all intents and purposes whatsoever; and such pew, seat, or sitting shall and may be again let in like manner hereinbefore mentioned.

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1 & 2 Wm. 4, c. 38.

Pews may be let.

IV. And be it further enacted, That the pews or sittings in such Church or Chapel shall be let by the churchwardens or chapelwardens, or by some person appointed by the trustees, or person or per-

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sons building and endowing the same, to act in that behalf, according to a scale of pew rents fixed by the trustees or such person or persons as aforesaid, and approved of by the bishop, which scale it shall be lawful for the trustees or such person or persons as aforesaid, with consent of the bishop, to alter from time to time as occasion may require: provided always, that all such pews as shall not be taken at the rent respectively fixed thereon, within fourteen days after the commencement of the ensuing year, shall in every such case be let to any inhabitant of any adjoining parishes or places in which there shall not be sufficient accommodation in the Churches and Chapels of the parish or place for the inhabitants thereof, at the rent respectively so affixed upon such pews, for any term not exceeding the end of the year, and at the expiration of the year, and also of every succeeding year in which any such pews shall be rented by inhabitants of any adjoining parishes, such pews shall be inserted in the list of vacant pews, to be taken in preference by the inhabitants of the parish or place to which the Church or Chapel shall belong; and all such pews as may not be so taken by any inhabitants of the parish or place may again be let, and so on from year to year, to any inhabitants of any adjoining parish or place.

Churches may be subjected to provisions of recited acts as to pews.

XXII. And be it further enacted, That it shall be lawful for the said commissioners if they shall think fit, in all such cases as shall come before the said commissioners, to order and direct that such Church or Chapel shall be subject to all the provisions of the said recited Acts or this Act as to apportionment of accommodation in pews and free sittings, and as to pew rents.

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PROHIBITION.

1 Wm. 4, c. 21.

Whereas the filing a suggestion of record on application for a writ of prohibition is productive of unnecessary expense, and the allegation of contempt in a declaration in prohibition filed before writ issued is an unnecessary form; and it is expedient to make some better provision for payment of costs in cases of prohibition; Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, that it shall not be necessary to file a suggestion on any application for a writ of prohibition, but such application may be made on affidavits only; and in case the party applying shall be directed to declare in prohibition before writ issued, such declaration shall be expressed to be on behalf of such party only, and not, as heretofore, on the behalf of the party and of his Majesty, and shall contain and set forth in a concise manner so much only of the proceeding in the Court below as may be necessary to shew the ground of the application, without alleging the delivery of a writ or any contempt, and shall conclude by praying that a writ of prohibition may issue; to which declaration the party defendant may demur, or plead such matters, by way of traverse or otherwise, as may be proper to shew that the writ ought not to issue, and conclude by praying that such writ may not issue; and judgment shall be given, that the writ of prohibition do or do not issue, as justice may require; and the party in whose favour judgment shall be given, whether on nonsuit, ver-

Applications for writs of prohibitions may be made on affidavit only.

Contents of declaration in case the party is directed to declare in prohibition.

Defendant may demur to declaration.

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dict, demurrer, or otherwise, shall be entitled to the costs attending the application and subsequent proceedings, and have judgment to recover the same; and in case a verdict shall be given for the party plaintiff in such declaration, it shall be lawful for the jury to assess damages, for which judgment shall also be given, but such assessment shall not be necessary to entitle the plaintiff to costs.

Judgment. Costs.

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